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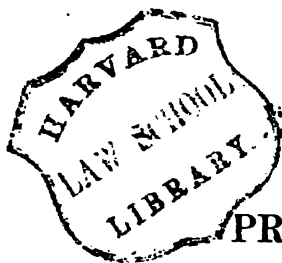
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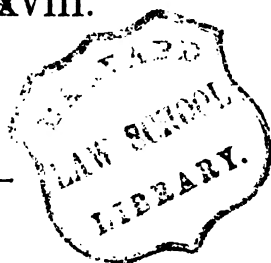
C O U R T O F A P P E A L S

OF THE

STATE OF NEW-YORK.

BY NATHAN HOWARD, JR.,
COUNSELLOR-AT-LAW, NEW-YORK.

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CASES REPORTED.

A.	PAGE.	F.	PAGE.
Andrews agt. Rowan.....	126	Fitzgerald agt. Blake.....	109
Anonymous.....	394	Fitzgerald ag. Blake.....	110
Annett agt. Kerr.....	324	Fullerton agt. Viall	224
Arnold agt. Johnson.....	249		
		G.	
B.		Garner agt. Wright.....	92
Barnard agt. Pierce	232	Gibson agt. Stone	468
Bassett agt. Crowell	241	Griffith agt. Brown.....	4
Benjamin agt. Murray.....	193		
Benson agt. Soares.....	511	H.	
Bergen agt. Stewart.....	6	Hamilton agt. Van Rensselaer....	192
Billings agt. Walker.....	97	Hecker agt. The Mayor, &c., of	
Bininger agt. Wattles.....	306	New York	211
Bowman agt. Tallman.....	482	Heints agt. Dillinger.....	39
British Commercial Life Insurance		Higenbothem agt. Lowenbein	221
Company agt. The Commissioners		Hoffman agt. Van Nostrand.....	115
of Taxes of N. Y	41	Holmes agt. Bennett.....	289
Brotherson agt. Consalus.....	117	Hubbard agt. Chapin.....	407
C.		I.	
Cadwell agt. Goodenough.....	479	In the matter of Chamberlain.....	1
Carpenter agt. Simmons.....	12	Ireland agt. Johnson.....	463
Carpenter agt. Willett.....	225	Irving agt. The People	205
Carpenter agt. Atherton.....	303		
Carpentier agt. Willett.....	376	J.	
Chandler agt. Egan.....	98	Jay agt. Groot.....	107
City Bank agt. Lumley.....	397	Johnson agt. Casey.....	492
Coope agt. Boules.....	10		
Cotes agt. Carroll	436	K.	
		Kelly agt. Lane.....	128
D.		Kelsey agt. Murray.....	242
Darlington agt. The Mayor, &c., of		Kerr agt. McGuire	27
New York	352		
Dyckman agt. Valiente.....	346	Lee agt. Marsh	275
		Lester agt. Abbott.....	488
E.		Levi agt. Dorn.....	217
Eyre agt. Beebe.....	833	Livingston agt. Painter.....	517
		Loonam agt. Brockway	472

Cases Reported.

M.	PAGE.		PAGE.
Martin agt. Martin.....	385	Siney agt. The New York Consolida-	481
McCardel agt. Peek.....	120	ted Stage Co.....	
McGovern agt. The Western Rail-		Sixth Avenue Railroad Co. agt.	
road Co.....	493	Kerr	382
McKeon agt. Lee.....	238	Slosson agt. Lynch.....	417
Mechanics' & Traders' Bank agt.		Smith agt. New York Consolidated	
Dakin.....	502	Stage Co.....	208
Meech agt. Loomis.....	209	Smith agt. New York Consolidated	
Moran agt. Morrissey.....	100	Stage Co.....	277
Muller agt. Santler.....	87	Smith agt. New York Consolidated	
Murphy agt. Boker.....	251	Stage Co.....	377
		Solomon agt. Solomon.....	218
N.		Stears agt. Miller	266
New York & New Haven Railroad		Stewart agt. Hamilton.....	265
Co. agt. Schuyler.....	187	Strong agt. Strong.....	432
Niles agt. Maynard.....	390	Stryker agt. New York Exchange	
Norton agt. Abbott.....	388	Bank	20
O.		T.	
O'Reilly agt. King.....	408	Thompson agt. Yates.....	142
Overing agt. Russell.....	151	Thorn agt. Cushman.....	95
		Town agt. Steamship Western Me-	
P.		tropolis.....	263
People agt. Harrison.....	247	Trenor agt. Fackin (note).....	78
People agt. The Court of Common		Trustees of the Estate of Kohn-	
Pleas.....	477	stamm agt. Foster.....	273
People ex rel. Hadley agt. The Su-		Tucker agt. White (note)	78
perisors of Albany.....	22		
People ex rel. Lumley agt. Lewis..	159		
People ex rel. Lumley agt. Lewis..	470	V.	
Person agt. Civer	139	Van Valkenburgh agt. The Mayor,	
Pignolet agt. Bush.....	9	&co., of New York	239
Place agt. The Butternut Woolen &		Van Wert agt. The City of Brook-	
Cotton Manufacturing Co	184	lyn.....	451
		Von Bruck agt. Peyser.....	292
R.		W.	
Ratsky agt. The People.....	112	Ward agt. Newell.....	102
Rauls agt. Dushler	66	Warth agt. Radde.....	230
Richmond agt. Sherman.....	491	Washington Life Ins. Co. agt. Lau-	
Rieben agt. White	320	rence.....	435
Robinson agt. Hall.....	342	Wheelock agt. Stewart.....	89
		White agt. Dodds	197
		White agt. Story	173
S.		Whitney agt. Wells	150
Schuchardt agt. Remiers.....	514	Williams agt. Barnaman.....	59
Schuyler agt. Hargous.....	245	Wright agt. Sanders.....	395
Soudder agt. Gori.....	155		



PRACTICE REPORTS.

SUPREME COURT.

IN THE MATTER of the application of WILLIAM CHAMBERLAIN and others.

Where a judgment is recovered against a *sheriff for an escape*, and the sheriff has procured a *stay of proceedings* on the judgment under the statute (2 R. S. 436, § 59), until final judgment and execution in an action which he has prosecuted on the bond for the jail limits given to him by the defendant who has escaped, it is not competent to sue the sheriff's *official bond*, to obtain satisfaction of the judgment against him during such stay.

Orange General Term, September, 1864.

Before BROWN, SCRUGHAM, LOTT and BARNARD, Justices.

APPEAL from an order entered on application for leave to prosecute the official bond of Anthony F. Campbell, sheriff of Kings county.

P. S. CROOKE, *for sheriff, appellant.*

JOHN SESSIONS, *for relators, respondent.*

By the court, LOTT, J. The relators having recovered a judgment against the sheriff of Kings county, for the escape of a judgment debtor committed to his custody, applied *ex parte* to the supreme court at special term, for leave to prosecute the official bond of the sheriff. The application was founded on a certified copy of the said bond, accompanied by proof showing the recovery of such judgment, and that no satisfaction of the same had been received, and thereupon the court ordered that the bond be prosecuted. The sheriff then applied to have said order vacated, alleging and showing that after the said judgment had been rendered against him, the court had by rule stayed

In the matter of Chamberlain.

all proceedings thereon until final judgment should be rendered in a suit which had been commenced by the sheriff against the sureties on the bond for the limits given to him, and if such judgment should be in favor of the sheriff, until the return of an execution thereon, but not to exceed sixty days. Such stay was in full force when the order authorising the prosecution of the said bond was obtained. The court denied the motion to vacate the said order, and in the rule entered it is stated that it was "denied as a matter of law and not of discretion."

From that rule the sheriff has appealed, and the question presented thereon for our decision is, whether the relators on the facts disclosed on the last motion were entitled to prosecute such bond.

The application was made and granted under the following provisions of the Revised Statutes (*Vol. 2, p. 476*):

"§ 1. Whenever a sheriff shall have become liable for the escape of any prisoner committed to his custody, or whenever he shall have been guilty of any default or misconduct in his office, the party injured thereby may apply to the supreme court for leave to prosecute the official bond of such sheriff.

"§ 2. Such application shall be accompanied by proof of the default or delinquency complained of, and that no satisfaction for the same has been received, and by a certified copy of such official bond.

"§ 3. Upon such application and proof, the court shall order that such bond be prosecuted."

One of the requirements necessary to confer the right in question, is that the sheriff shall have become liable for the escape, and if the proceedings upon the judgment recovered against him by the relators had not been stayed, the judgment would have established such liability, but, as has been shown, an order staying all proceedings thereon was in full force when the relators' application was made. Such stay was granted under a provision of law which pro-

In the matter of Chamberlain.

vides that in case the party at whose suit any person shall have been confined to the liberties of a jail, shall refuse or neglect to take an assignment of the bond executed by such person on being admitted to such liberties, and shall prosecute the sheriff for the escape of such person, "the court in which such action shall be pending, shall, by rule, stay all proceedings upon the judgment against such sheriff, until he shall have had a reasonable time to prosecute the bond taken by him, and to collect the amount of any judgment he may recover thereon" (2 *Rev. Stat.* p. 436, § 59). The effect of the rule made under this provision is to qualify the sheriff's liability so far as to relieve him from the operation of the judgment so long as such stay of proceedings is in force. The provision of law first referred to, regulating the right to prosecute the sheriff's bond, contemplates an existing present liability on the part of the sheriff.

In requiring proof on the part of the applicant that no satisfaction for the sheriff's default or delinquency has been received, it is apparent that the right to demand satisfaction must exist. The stay of the relators' proceedings deprive them of that right in the present case.

If it were competent to sue the sheriff's official bond, the stay of proceedings would, by the judgment thereon, become ineffectual; for the relators might enforce that judgment, and thus in reality obtain satisfaction of the judgment in the original suit for the escape, in direct contravention of the statute, or at least the rule under it inhibiting the collection thereof.

The provisions of the different statutes above cited should be so construed as to give all of them full effect, and that can be done by holding that the sheriff, by reason of the stay of proceedings, was not chargeable with such a liability as to authorise a prosecution of his official bond during its continuance.

Griffith agt. Brown.

The order appealed from should therefore be reversed, with ten dollars costs of the appeal, and an order should be made vacating the original order, with ten dollars costs.

NEW YORK SUPERIOR COURT.

JAMES GRIFFITH agt. ANN BROWN AND ANOTHER.

A *warrant of dispossession*, in summary proceedings to recover the possession of land, will be *stayed by injunction*, where it appears that the defendant in such proceedings had not time to arrive at the court room, before the hearing, after the service of the summons.

New York Special Term, October 1864.

Before ROBERTSON, Chief Justice.

THIS is a motion to continue an injunction restraining the defendants from executing or procuring to be executed a warrant issued by a justice of a district court in this city, in summary proceedings to remove a tenant under the statute for holding over. The summons was issued September 13, 1864, at 11 A. M., returnable at 2 P. M. of the same day, and the process was given to the officer for service immediately after it was issued; the officer retained the process till about twenty minutes past one o'clock, when he served it, by leaving it with a person of mature age on the premises during the tenant's absence. The proceeding was called at two P. M., and judgment entered and warrant issued at half-past two, and the tenant arrived at the court house about fifteen minutes after the warrant issued.

E. HAINES, *for plaintiff.*

DAVID McADAM, *for defendants.*

ROBERTSON, C. J. It is possible the proof of service of the summons without showing the time of it, may have

Griffith agt. Brown.

been sufficient to confer jurisdiction on the magistrate to issue a dispossessing warrant; at all events injustice in that respect could not be corrected on certiorari, as nothing appears on the record of the time of the service of the summons or the possibility of the tenant's reaching the court room after such service. If the magistrate has an arbitrary right to fix the time of appearance, and the delivery of a summons to a person to be served is the issuing of it, within the meaning of the statute, no similar right is given to the person receiving the summons to diminish as he pleases the time within which the tenant has a right to appear, by delaying its service until too late. If due proof of service in order to comply with the statute may be made simply by proving a delivery of the summons at sometime during the day, sufficient time should be afforded to the party served after the proof is made to attend in order to be heard, particularly where the service is not personal. The law could not have intended such a mockery of justice as to expel a party in possession without an opportunity of being heard. The magistrate might, if the improper issuing of the warrant of dispossession was made known in time, withhold it or possibly might recall it, if so improvidently issued, but I do not find any authority in the statute for reconsidering his decision made on the *ex parte* evidence of the landlord. For an evil under color of legal proceedings, which has no other remedy, an injunction order must be the proper one. Whether the dilatory service of the summons in this case is to be considered a fraud on the law, or the judgment given by the magistrate in the absence of a party who has not had time to arrive at the court room before the hearing after service of the summons, is to be considered as a surprise, I think the right of enjoining may be exercised. The cases of *Vallotton* agt. *Seignett* (2 Abb. 121), and *Cure* agt. *Crawford* (1 Code Rep. N. S. 18), seem to sustain the first view, and that of *Forrester* agt. *Wilson* (1 Duer, 624), the second; of

Bergen agt. Stewart.

course staying proceedings on the first warrant now issued, will not prevent a new application to dispossess; of course neither party will be at liberty to use such adjudication on such second application. It is possible, of course, that the plaintiff might have reached the court room in time for the hearing, if the summons had been served upon him personally an hour before the time of appearing; but that was too short apparently to enable the party on whom it was served to carry it to him and for him to find a legal adviser and get to the place of hearing in time. He appears to have used every diligence to reach there in time, and failed. The motion must be granted, with ten dollars costs to the plaintiff, to abide the event of the suit.

SUPREME COURT.

PETER J. BERGEN agt. WILLIAM J. STEWART AND JOHN CLAPP, JR.

The court has the power to direct an entry to be made by the clerk on the docket of the judgment "secured by appeal" upon such terms as it may deem fit, and by requiring that an *additional surety* be given, is clearly within the provision of § 282 of the Code.

The defendants were sureties in the original undertaking, and the plaintiff an additional surety upon the appeal by virtue of an order of the court, *Held*, that the latter thereby assumed an equal responsibility with the former. The plaintiff as well as the defendants were in fact sureties for a principal debtor in relation to one and the same transaction, and the doctrine of *contribution* is clearly applicable to such a case.

Therefore, where the plaintiff claimed in his complaint to recover the full amount of the judgment paid by him on appeal, *Held*, that his remedy must be confined to a *proportionate share* against the defendants as his co-sureties.

New York, Special Term, April, 1864.

ACTION by the plaintiff to recover of the defendants, who were sureties on an original undertaking on appeal, the amount of the judgment rendered on appeal, which the plaintiff had paid as an additional surety on such appeal.

Bergen agt. Stewart.

J. W. & W. W. CULVER, *for plaintiff*.W. V. McDANIEL & H. W. ROBINSON, *for defendant*
Stewart.

MILLER, J. I think that the undertaking executed by Bergen was a valid one, and that he was legally liable upon the same. (*See Blanchard agt. Thompson*, 3 Coms. 335; *Seacord agt. Morgan*, 17 How. Pr. R. 374.) Although not executed upon the original appeal, yet, being made in pursuance of an order of the court, it was quite as valid and effectual. The court had power to direct an entry to be made by the clerk on the docket of the judgment "secured by appeal" upon such terms as they should deem fit, and by requiring that an additional surety be given were clearly within the provision of section 282 of the Code.

The order of the judge that the application be granted upon the defendant's adding a bond with one surety, who should justify upon notice, and his subsequent approval of the undertaking signed by the plaintiff, shows that he intended that such an instrument should be executed. The use of the word bond, instead of undertaking, by no means affects the validity of the instrument; and, as the instrument was such as is provided for by the Code in cases of appeal, it can scarcely be claimed that the judge exceeded his authority in making the order. Its validity does not depend upon the fact that the judge approved it, but it is a valid and legal security, because it was in conformity to the provisions of the Code.

I am of the opinion that the execution of the undertaking by Bergen was a part and portion of the same transaction as the making of the original undertaking upon the appeal. They were one and the same transaction, and related to the same judgment, and the same subject matter. The consideration for both was the appeal from the judgment, and when the defendants executed the undertaking, signed by them, they did so with full knowledge

Bergen agt. Stewart.

that the court had the power to make the order which was made. It was not the act of Bergen, but the order of the court which effected the release of the lien of the judgment upon the real estate of the defendant therein.

The court by its order directed that an additional surety be added on the appeal by the execution of another instrument for that purpose, thereby increasing the number and dividing the responsibility of each, and I discover no valid legal ground why the sureties on the first undertaking should not contribute their share towards the payment of the judgment paid by Bergen.

The defendants were sureties on the original undertaking, and Bergen an additional surety upon the appeal by virtue of an order of the court. The latter thereby assumed an equal responsibility with the former. The plaintiff as well as the defendants "were in fact sureties for a principal debtor in relation to one and the same transaction" (*Nelson agt. Coons*, 3 *Denio*, 132), and the doctrine of contribution is clearly applicable to such a case.

Although the plaintiff claims in the complaint to recover the full amount paid by him, his remedy must be confined to a proportionate share against his co-sureties. As it appears that the defendant Clapp is insolvent, I think that Stewart should be charged with one-half of Clapp's share. Stewart should be credited with the \$1,020 paid by him, as the sale of the cotton appears to have been for his individual benefit. The plaintiff is not entitled to recover the costs of the suit litigated by him. At most he would be entitled to the costs of a judgment by default, (*Holmes agt. Weed*, 24 *Bar.*, 546).

In accordance with these suggestions, findings may be drawn up and served on the attorney for the defendant Stewart, and settled upon notice, and judgment entered in favor of the plaintiff, with costs.

Pignolet agt. Bushe.

SUPREME COURT.

PIGNOLET agt. BUSHE.



In order to preserve the property from serious loss, the court will appoint a receiver during the pendency of an action in *partition*.

New York General Term, June, 1864.

Before LEONARD, P. J., CLEKKE and BARNARD, Justices.

APPEAL by defendant from an order of special term, appointing a receiver in an action in *partition*.

By the court, CLEKKE, J. Undoubtedly, receivers will rarely be appointed in actions for the recovery of real property; for a court of equity generally refuses to interfere for or against the legal title; although, in actions to set aside fraudulent conveyances and in other equitable actions receivers will be appointed when the safe disposition and management of the property require it. Even in an action to set aside a purchase on the ground of inadequacy of price, where the defendants were in possession and devisees of the purchaser, the Lord CHANCELLOR appointed a receiver. (*Stillwell agt. Watkins*, 1 *Jacobs*, 280.) The power of the court in this respect is only limited by considerations of what is expedient for the interests of the parties concerned. This is an equity, not a common law action, for the partition of real estate. During the pendency of the action, from the affidavit of the plaintiff, the court below had good reason to believe that some portion of the property could not be rented, in consequence of the refusal of the defendant Bushe to unite with the other tenant in common (the plaintiff), and that the rents of other portions which had been rented could not be collected, in consequence of her interference. Under these circumstances it became desirable, in order to preserve the pro-

Coope agt. Bowles.

perty from serious loss, for the court to appoint a receiver during the pendency of the action.

The order should be affirmed, with ten dollars costs.

SUPREME COURT.

HENRY H. COOPE, receiver agt. CHARLES S. P. BOWLES AND
OTHERS.

A receiver in general is not clothed with any right to maintain an action which the parties or the estate which he represents could not maintain. He must show a cause of action existing in those parties, and that by the appointment of the court, lawfully made in a matter where the court had jurisdiction, the power has been conferred on him in his representative capacity as receiver, to prosecute the action.

Where a receiver brings an action to set aside an assignment for the benefit of creditors as void, it is not enough to allege in his complaint that he was appointed receiver in supplementary proceedings. The judgment and other facts necessary to maintain supplementary proceedings must be stated. He must state the equity of the parties whose rights under the order of the court appointing him he represents, to maintain such an action.

An assignment for the benefit of creditors made by a *partnership firm*, a part of whom are absent from the state, cannot be supported unless due authority for its execution by the absent members, or its subsequent ratification by them is proven.

New York General Term, June, 1864.

Before LEONARD, P. J., CLERKE and BARNARD, Justices.

APPEAL by defendants from a judgment at special term, declaring void an assignment for the benefit of creditors, made by the defendants—a partnership firm.

OSBORN E. BRIGHT, *for appellants.*

W. W. GOODRICH, *for respondent.*

By the court, LEONARD, P. J. Neither the statements of the complaint, nor the evidence adduced at the trial, gives the court jurisdiction to declare the assignment from De Agreda, Jove & Co., to Charles S. P. Bowles, void, or to set it aside. No authority is stated in the complaint or proven in the case, which will authorize the court to direct

Coope agt. Bowles.

a receiver to prosecute an action for such a purpose. It is alleged that the receiver was appointed in supplementary proceedings. That is not enough. The judgment and other facts necessary to maintain supplementary proceedings are wanting. A simple contract creditor cannot maintain an action to set aside an assignment for the benefit of creditors. Receivers are appointed by the court with the like powers with the plaintiff in this case in various other kinds of actions, as in actions between partners, &c., but the receiver must state in his complaint the equity of the party whose rights, under the order of the court appointing him he represents, to maintain the action which he here attempts to prosecute. A receiver in general is not clothed with any right to maintain an action which the parties or the estate which he represents could not maintain. He must show a cause of action existing in those parties, and that by the appointment of the court lawfully made, in a matter where the court had jurisdiction, the power has been conferred on him, in his representative capacity as receiver, to prosecute the action.

The complaint and the proofs are wholly defective in these particulars. The judgment has not cured it.

The assignment was declared void because it was not executed by all the members of the firm personally. The firm consisted of four members. Two were here and executed for themselves, and also as attorneys for the others, who were absent from the state. I think it was sufficiently proven that De Agreda held a power of attorney from one of the absent members, Mr. Jove, authorizing him to do any act in connection with the business of the firm in his discretion. The proof was entirely defective in showing a sufficient power of attorney from the other absent member, Mr. Ponte. The evidence of ratification as to Ponte, is also insufficient; but as to Mr. Jove, there can be no doubt that he was satisfied with the act of his partners here, and ratified it. It is not necessary to pursue the examination

Carpenter agt. Simmons.

of the facts found by the referee, or his conclusions of law, unless it be as a guide to the court in this case, should there be any future trial. It must be conceded that the assignment cannot be supported unless due authority for its execution by the absent members of the firm, or its subsequent ratification is proven.

Whatever moneys of the estate were paid for expenses, or to creditors under the assignment, in good faith, before the commencement of this action, should be allowed to the assignee, if the assignment should finally be held invalid. Payments to himself, or to his own firm would not come within this principle.

The referee, it appears, settled the decree and directed its entry by the clerk, but no judge of the court has directed the entry of judgment. The question is one of regularity merely, and is not a ground of reversal on appeal from the judgment. The question can properly arise only on a practice motion at special term to set it aside for irregularity. The powers of the referee to hear and decide are terminated when he has made his report, with the exception that he can settle the form of the case, and the findings of fact and conclusions of law.

The judgment should be reversed and a new trial ordered, with costs of the appeal to the appellants, with leave to the respondent to apply at special term to amend his complaint.

NEW YORK SUPERIOR COURT.

JACOB CARPENTER agt. WILLIAM SIMMONS.

The provisions of the 59th section of the *district court act* of the city of New York, are *directory merely*. They impose a mere ministerial duty upon the clerks of those courts, the omission to perform which would not invalidate a judgment which had been regularly recovered; although the docket and a transcript is made evidence, there is nothing in the act which makes it the only evidence. And if

Carpenter agt. Simmons.

the clerk should wholly neglect to make up his docket, the plaintiff in any suit or proceeding where it became necessary, could prove by *other evidence* the recovering of his judgment.

Where an *execution* directed to the sheriff; subscribed by the party issuing it; intelligibly refers to the judgment; states the court and county where the judgment was recovered and transcript filed; names of parties, &c., nothing more is required. The *teste* is no necessary part of the execution, nor is the direction to *return*; any errors which may occur in either are immaterial.

Where a sheriff by virtue of an execution, sells a store of goods which are subject to a chattel mortgage, he sells the equity of redemption of the defendant in the execution. And in a sale of this kind the sheriff must necessarily *sell the property in bulk*, and will not be permitted to sell it separately or in parcels.

It seems that no one besides the *defendant* in the execution, can object to the *manner of making the sale* of the property by the sheriff.

A *chattel mortgage*, which, after enumerating the goods mortgaged, contains a clause in the following form, is *void as to creditors*—to wit: "And also all other goods, chattels, &c., which may be substituted for any similar property now appertaining to the business of said firm, or belonging to said firm, at said store and shop, or which may be added by way of purchase or exchange, thereto. It being intended and declared that all the property, stock, tools and fixtures, which may at any time form part of and belong to said business of said firm of T— & Co., at the premises aforesaid, whether the same be now in existence, or hereafter created or acquired, shall be and is included in, covered and conveyed by the foregoing mortgage."

A plaintiff in a judgment and execution, who purchases merely the interest of the defendants in the property sold on the execution, is not estopped from questioning the validity of a prior chattel mortgage given by the defendants on such property.

Where the evidence showed that the defendant, the mortgagee in the chattel mortgage, had seized and sold under the mortgage, a considerable amount in value of property by the mortgagors, the defendants in the execution, after the mortgage was made, and which the plaintiff had purchased at the sheriff's sale, and it appearing that the verdict for the plaintiff was for the value of a portion only of the goods taken, without designating what portion, the court would assume that the verdict was for the value of that portion of the goods not covered by the mortgage, and for which the plaintiff was clearly entitled to recover.

The declarations of the parties to the mortgage were not admissible as evidence to sustain the mortgage as against a judgment creditor.

New York General Term, November, 1863.

BOSWORTH, C. J., WHITE and MONELL, Justices.

THIS action was for the conversion of personal property. The plaintiff recovered judgment in the sixth district court, in this city, against Tibbetts & Co., upon which an execution was issued, under which the sheriff levied upon the goods of Tibbetts & Co., and sold their right, title and interest. The plaintiff purchased at the sale and took pos-

Carpenter agt. Simmons.

session. The defendant claimed the property under a chattel mortgage from Tibbetts & Co. to him, given prior to the plaintiff's judgment.

The mortgage, after enumerating the goods mortgaged, contained the following clause: "And also all other goods, chattels, &c., which may be substituted for any similar property now appertaining to the business of said firm, or belonging to said firm at said store and shop, or which may be added, by way of purchase or exchange, thereto. It being intended and declared that all the property, stock, tools and fixtures, which may at any time form part of and belong to said business of said firm of Tibbetts & Co. at the premises aforesaid, whether the same be now in existence or hereafter created or acquired, shall be and is included in, covered and conveyed by the foregoing mortgage."

Subsequently to the sale by the sheriff, and purchase by the plaintiff, the defendant took possession of the property under his mortgage and sold it. The sale by the sheriff was of the right and title of Tibbetts & Co. It was in bulk and not by parcels, and the plaintiff purchased for five dollars.

The defendant objected to the introduction of the transcript of the plaintiff's judgment against Tibbetts & Co., and also of the execution issued thereupon. The objections were overruled and the defendant excepted. There were two motions made to dismiss the complaint, which were refused. There were several exceptions to the admission and rejection of evidence, and several requests by the defendant to charge the jury, which were refused.

The jury rendered a verdict for the plaintiff for the value of a portion only of the goods. A motion was made at special term for a new trial, which was denied; and thereupon judgment was entered upon the judgment.

The defendant appeals from the judgment and order.

MR. LOCKWOOD, *for appellant.*

A. R. DYETT, *for respondent.*

Carpenter agt. Simmons.

By the court, MONELL, J. There are two questions presented on this appeal: one as to the sufficiency of the plaintiff's title; the other as to the validity of the defendant's mortgage. The first question involves the examination of the plaintiff's judgment and execution, and of the sale made by the sheriff under it.

The plaintiff's judgment against Tibbetts & Co. was recovered in a district court of this city, denominated, in the act reducing the several acts relating to those courts into one act (*Laws of 1857, vol. 1, p. 707*), as "district courts of the first, second, &c., districts of that city."

The 59th section of the act directs that the clerks of these courts shall keep a book, denominated a docket book, in which he shall enter certain particulars, defined in the various subdivisions of the section, and intended to contain a history of the proceedings in the action to and beyond judgment. The 60th section makes a transcript of such docket evidence of the "facts stated therein."

The transcript offered in evidence of the plaintiff's judgment contained, I think, all that is required by the 59th section, and shows the regular recovery of a judgment against the defendants therein.

If any question as to the jurisdiction of the justice over Simmons, who was not served with process, could be raised by the defendant in this action, it is answered by the two facts: first, the defendants were sued as joint contractors, and the service on one gave jurisdiction, and the judgment in form was correctly entered against both, under which their interest in property jointly owned by them could be sold; and second, that the defendant, Simmons, was present at the trial and subjected himself to the jurisdiction of the justice. It was urged by the appellant's counsel that the transcript of the docket was deficient in not stating that a transcript had been given, to be filed in the county clerk's office, as required by the 10th subdivision.

The transcript was evidence only of the facts stated in

Carpenter agt. Simmons.

it. It was not evidence of the giving of a transcript to be filed. It was necessary, and the plaintiff did prove by other testimony the filing of a transcript in the county clerk's office, prior to issuing his execution.

The provisions of the 59th section are directory merely. They impose a mere ministerial duty upon the clerks of those district courts, the omission to perform which would not invalidate a judgment which had been regularly recovered. And if the clerk should wholly neglect to make up his docket, I apprehend the plaintiff, in any suit or proceeding where it became necessary, could prove by other evidence the recovery of his judgment. The docket and a transcript is made evidence, but there is nothing in the act which makes it the only evidence, and the party may still resort to other competent evidence to prove his judgment.

I have not been able to find that any of the objections to the transcript are tenable. It showed the recovery of a judgment, and that the parties and the action were within the jurisdiction of the justice, and that all the preliminary steps had been taken to make the judgment regular. Whatever was omitted was not essential to the right to issue execution, other proof having been offered and received, to supply any such deficiency.

I think the objections to the execution were more to its form than to its substance. The 289th section of the Code prescribes what shall be contained in an execution, and it seems to me the execution which was issued upon the plaintiff's judgment contained every fact required.

It was directed to the sheriff; subscribed by the party issuing it; intelligibly referred to the judgment; stated the court and county where the judgment was recovered and transcript filed; names of parties, &c. Nothing more was required to be stated. The teste was no necessary part of the execution, nor was the direction to return, and therefore, any errors in them were immaterial. I think the objections to the execution were properly overruled.

Carpenter agt. Simmons.

The sheriff under the execution sold only the right, title and interest of Tibbetts & Co. in the goods; in other words, he sold the equity of redemption of Tibbetts & Co. In a sale of this kind, the sheriff must necessarily sell the property in bulk, and would not be permitted to sell it separately or in parcels. The mortgagee has the right, when his right to take possession accrues, to follow the property and seize it under his mortgage, and it could not be tolerated that in selling, in effect, subject to the mortgage, he could distribute it among a multitude of purchasers. As I understand it, the sale was in bulk in *Hall agt. Carnley* (11 N. Y. R. [1 Kern.] 501); *Tift agt. Barton* (4 Den. 171.)

The question of actual levy was left, upon the evidence, to the jury. The testimony was somewhat contradictory, but the jury have passed upon it, and it was sufficient to sustain their verdict.

It was objected that the property sold by the sheriff was not present in view of the purchasers at the sale. There was evidence, however, both ways on that subject, and the learned judge carefully submitted it to the jury, that the plaintiff could recover for the value of such property only as was present at the sheriff's sale, within the view of the bidders.

The charge in respect to the levy and sale was favorable to the defendant and no exception was taken to it.

We were not referred on the argument, nor have I been able to find any case deciding that any one, besides the defendant in the execution, can object to the manner of making the sale. It would seem, that it does not lie with any other party to insist, that the sale shall be, in all respects, conformable with the requirements of the statute.

Be it so, however, that the defendant, as mortgagee out of possession, may object to the sufficiency of the sale, then we are brought to the remaining question, namely, as to the validity of the defendant's mortgage.

The case of *Edgell agt. Hart* (9 N. Y. R. [5 Seld.] 213),

Carpenter agt. Simmons.

is decisive, I think, that a mortgage containing a provision like that contained in the defendant's mortgage is void as to creditors. In that case the mortgage was made "to include, also, all other articles of like nature which may be put, or be in said store, whenever the party of the second part may be entitled to enforce the within mortgage," and the whole mortgage was held void. In this case, it was submitted to the jury as a question of fact for them to determine upon the evidence, whether the mortgage was made with intent to hinder and delay creditors. It would not have been going too far, I think, for the judge to have instructed the jury that the mortgage was void in law, as intimated in the opinion in *Edgell agt. Hart* (*supra*, p. 219), but the judge chose to leave it to the jury to be determined as a question of fact, and they have found against the defendant on that issue.

The plaintiff having established his judgment against Tibbetts & Co., was in a position to attack the defendant's mortgage, and his purchase under his execution at the sheriff's sale did not deprive him of this right (*Hildreth agt. Sands*, 2 J. C. R. 36). He did not purchase subject to the mortgage. He merely purchased the interest of Tibbetts & Co. which interest was conveyed by a mortgage which was or was not valid. There was nothing, therefore, in the sale or purchase that estopped the plaintiff from questioning the validity of the Tibbetts mortgage.

If the views which I have here expressed are correct, they dispose of all the questions raised upon the motions to dismiss the complaint, as well as to the exceptions to the refusals to charge, and to the charge itself.

The verdict was for the value of a portion only of the goods taken—for what portion does not appear. The evidence shows, however, that the defendant had seized and sold under the mortgage a considerable amount in value, of property not covered by the mortgage, and which the plaintiff had purchased at the sheriff's sale. In respect to

Carpenter agt. Simmons.

that the learned judge charged the jury that "such property as was acquired by Tibbetts & Co., after the mortgage was given, was not legally embraced in the mortgage;" that Simmons had no right to take and sell that property, and that the plaintiff was entitled to recover its value.

In looking at this case we are to see whether the evidence sustains the verdict under the charge of the judge, for to this part of the charge there was no exception.

It is impossible to say whether the verdict was or was not for the value of such property only as was acquired by Tibbetts & Co., after the mortgage was made. If so, it could not be disturbed. To that extent the plaintiff was clearly entitled to recover, and if it is necessary in order to sustain the verdict, I think we are bound to assume that such was the verdict.

The inquiry of the witness, John Simmons, was properly excluded. There was no evidence of any interference with the property by the deputy sheriff. At most, the question bore upon the levy, but it was too remote to affect that question.

The declarations of the parties to the mortgage were not admissible to sustain the mortgage as against a judgment creditor, and were properly excluded.

It was perhaps not competent to prove the judgment in the district court by parol, if such proof was necessary, which I think was not. In these courts, the judgment pronounced by the judge is entered in the docket by the clerk, and as we have seen, his omission to do so would not invalidate the judgment, nor render it unavailing. I think it was competent to prove that John Simmons was present at the trial in the district court, and that the check was the copartnership check of Tibbetts & Co. Independently of the judgment, the plaintiff, as a creditor of Tibbetts & Co., could attack the mortgage, and the evidence tended to prove him such creditor. It did not contradict the record, nor go to sustain it,

Stryker agt. The New York Exchange Bank.

The exclusion of any evidence by the defendant, of the nature of the debt evidenced by the check, unless the defendant would put the check in evidence, it being offered to him by the plaintiff for that purpose, was proper. The condition was in the discretion of the judge, and cannot be reviewed.

It was immaterial whether John Simmons was present at the trial in the district court or not. The defendants there were joint contractors, and, as I have before stated, the judgment was properly in form against both, and would reach their joint property, although no service was made upon one of the defendants. Hence it was proper to exclude all inquiry on that subject.

I have thus briefly reviewed the exceptions taken by the defendant to the admission and rejection of evidence. I cannot find that any of them are well taken, and am therefore of opinion that the judgment and order appealed from should be affirmed.

SUPREME COURT.

STRYKER agt. THE NEW YORK EXCHANGE BANK.

The plaintiff has a right to amend his complaint of course, and without costs, changing the place of trial, *after the service of the answer.*

New York Special Term, August, 1864.

THE plaintiff commenced his action by a summons, containing a notice that the complaint would be filed in the county of New York. The defendant having appeared, the plaintiff served the defendant with a complaint, stating the place of trial to be the county of New York. The defendant having answered, the plaintiff served an amended complaint, stating the place of trial to be in the county of Oneida. The defendant now moved to set aside the amended complaint for irregularity.

Stryker agt. The New York Exchange Bank.

A. S. VAN DUZER, *for the motion*,

insisted that the place of trial was fixed by the summons and complaint, and could not be changed except on motion (*Bangs* agt. *Selden*, 13 *How.* 163). The Code (§ 126), expressly provides how the place of trial shall be changed, viz.: "by order of the court." A plaintiff has no more right to change the place of trial by merely amending his complaint than the court would have power at any stage of the cause to change it on a motion to amend, instead of a motion under section 126.

Section 172 has always been regarded with some qualifications and restrictions. (3 *Code R.* 189; 6 *How.* 321; 1 *Code R.* [*N. S.*] 318.)

CHARLES TRACY, *contra*.

The statement of the place of trial is a part of the complaint (*Code*, § 142), and therefore is amendable, of course. The former general rules of court, authorizing amendments, of course are incorporated into the Code (*Rules*, 1790, *No.* 8; 1830, *No.* 23; 1837, *No.* 24; 1847, *No.* 22; *Code*, § 172; *Code* of 1848, § 109). Those rules were held to allow an amendment of the declaration by change of venue (*Wakeman* agt. *Sprague*, 7 *Cowen*, 174, 175, 176; *Hitchcock* agt. *Post*, 1 *Wendell*, 16), and the Code was designed to continue that practice. The notice in the summons of the place where the complaint will be filed was first required in 1849, not being in the original Code of 1848 (§ 109), and this change in the form of the summons does not affect the right to amend the complaint, given by the Code in 1848, and still in force without change. After appearance and answer, the summons is of no importance.

By the court, BARNARD, J. The plaintiff had a right so to amend his complaint, of course, and without costs. Motion denied.

People agt. The Supervisors of Albany.

SUPREME COURT.

THE PEOPLE *ex rel.* WILLIAM J. HADLEY agt. THE SUPERVISORS OF ALBANY COUNTY.

Where counsel are assigned by the court to defend a prisoner on the trial of an indictment, even against their express desire, there is no constitutional or statutory provision of this state which recognises the claim of the counsel for such services, by which they may be charged against the county, and audited and paid by the board of supervisors.

Upon the principles established by the decisions of the courts of this state, to charge a county with a claim for services rendered or expenses incurred, there must be some statutory authority authorising the same to be rendered or incurred, or directing the payment thereof, before the board of supervisors can be compelled by mandamus to audit such claim.*

Albany Special Term, April, 1864.

THIS is an application for a mandamus to compel the board of supervisors of Albany county to audit the claim of the *relator*, for services rendered in the defence of Mary Hartung, who was indicted for murder. It appears from the papers, that on the 21st day of September, 1858, on motion of Samuel G. Courtney, Esq., then district attorney of Albany county, an order was entered at the oyer and terminer held in and for said county, assigning the *relator* attorney and counsel for the prisoner. The *relator* applied

*NOTE.—This seems to be a very proper case for calling the attention of the legislature to the justice of passing a law to compensate counsel for such services. Although the courts have the strict right to assign counsel to take charge of the defence of prisoners under indictment, who are unable to employ counsel, yet the justice, equity, or even propriety of requiring this forced service without fee or reward, or hope of reward, is not perceived. If a young attorney just admitted to the bar is willing to volunteer the defence of such a case, with the view of trying his wings on a little spread eagle eloquence, why, all right, let him soar, free as air—free certainly of any pecuniary consideration. But it is a very different matter when, as in this case, a lawyer of many years standing at the bar, who usually has as much business that pays as he can attend to, is forced to take charge of the defence of a criminal, and has to go through the different courts on intricate and novel questions arising under a change of statutes bearing on the case, and on the final success of his efforts is left without any compensation, save the satisfaction of having faithfully performed a duty which he would gladly have accepted a release from originally. RHP.

People agt. The Supervisors of Albany.

to the court to be excused from such service, which was denied. From that time, during a period of about three years, the *relator* conducted the defence of the prisoner through the various courts, until she was finally acquitted. The defence, while it was attended with great labor, necessarily consumed much time, and the *relator* for his services presented to the defendants his claim of \$3,766, properly verified, to be audited and allowed, and the same was rejected.

LYMAN TREMAIN, *for the motion.*

S. F. HIGGINS, *district attorney, opposed.*

INGALLS, J. The claim of the *relator* is just, and should be audited and paid, if it is a legal charge against the county of Albany. A mandamus issues only where there is a clear legal right (*The People agt. The Supervisors of Chenango county*, 11 N. Y. R. 563, 574).

The Revised Statutes (5th ed. vol. 1, p. 848, § 2), provide as follows: "The board of supervisors of each county in this state shall have power at their annual meeting, or at any other meeting, 1st. To make such orders concerning the corporate property of the county as they may deem expedient. 2. To examine, settle and allow all accounts chargeable against such county, and to direct the raising of such sums as may be necessary to defray the same. 3. To audit the accounts of town officers and other persons, against their respective towns, and to direct the raising of such sums as may be necessary to defray the same. 4. To perform all other duties which may be enjoined on them by any law of this state." The authority to audit and allow this claim is to be found, if at all, in the second subdivision of the above section.

Is this claim chargeable against said county? In the case of *The People agt. The Supervisors of Fulton county* (14 Barb. Rep. 56), ALLEN, J., says: "If services are ren-

People agt. The Supervisors of Albany.

dered which are not provided for *by the statute, however meritorious*, they are gratuitous, and the party is not entitled to compensation." (*The People agt. The Supervisors of New York*, 1 *Hill*, 362; *The People agt. Lawrence*, 6 *Hill*, 244.) In the last case, BRONSON, J., says: "They" (speaking of the board of supervisors) "have only such powers as have been conferred upon them by the legislature, and there is no statute which gives any color for saying that they could indemnify the *relator* against the expenses of his defence. And whatever appearance of justice there may be in charging the expenses of the accused upon the county, it is enough for us to say that this consideration addresses itself exclusively to the legislature" (*The People agt. Van Wyck*, 6 *Cowen*, 260).

I have not been able to find any statute of this state, which under the most liberal construction, directs or even authorizes the court to assign counsel to defend prisoners, or that provides any compensation, or prescribes any mode of payment for such service. It was insisted upon the argument that such authority was to be found in the constitution of this state. The seventh article and seventh section of the constitution provides as follows: "And in every trial on impeachment or indictment, the party accused *shall be allowed counsel as in civil actions*." The obvious construction of this provision is, that a prisoner may have the assistance of counsel in conducting a defence, not that the court shall provide such counsel at the expense of the county. Courts have uniformly assigned counsel to defend prisoners who had not the ability to procure counsel, and the members of the legal profession have rendered the service without the expectation of pecuniary reward from any source, at least not from the county. So uniform has been this practice, that I have been unable to find a case in the reports of this state where such a claim has been asserted. This consideration, however, while it indicates pretty clearly what has been the understanding of the

People agt. The Supervisors of Albany.

courts and the legal profession in this state upon the subject, should not prevent the recognition and enforcement of such a claim, if it is a legal charge against the county. It may be well to examine some of the cases where claims have been enforced by mandamus, with a view of ascertaining upon what principle the courts have proceeded. *In the matter of Bright agt. The Supervisors of Chenango county* (18 John. Rep. 242), which was an application for a mandamus to compel the supervisors to audit the claim of the *relator* as clerk of the county of Chenango, for certain books procured by him in which to record deeds, mortgages, and other proceedings, the court held that although the statute did not prescribe the manner the clerk was to be compensated, yet as the expenditure was authorized by statute, the right to compensation would be implied, *and the purchase being for the express benefit of the county*, it was chargeable. The court gave controlling effect to the fact that *the purchase was authorized by the statute, and the same was for the express benefit of the county*. In the case *The People ex rel. Hilton agt. The Supervisors of Albany county* (12 Wend. Rep. 257), the application was for a mandamus to compel the supervisors to audit a claim of the *relator* for attendance at the clerk's office to witness the drawing of juries for the common pleas and mayor's courts. The court directed that the writ issue, basing its decision upon the fact that *the statute expressly directed the service*. (*Mallory agt. The Supervisors of Courtland county*, 2 Cowen, 531, 533; *Doubleday agt. The Supervisors of Broome county*, 2 Cowen, 533, 534.) The principle seems to be established by the decisions of the courts of this state, that to charge a county with a claim for services rendered or expenses incurred, there must be some statutory authority authorizing the same to be rendered or incurred, or directing the payment thereof, before the board of supervisors can be compelled by mandamus to audit such claim. The counsel for the *relator* has cited a case decided by the

People agt. The Supervisors of Albany.

supreme court of Iowa, *Hull agt. Washington county* (2 *Green's Rep.* 473). In that case counsel was assigned to defend a prisoner who was unable to procure counsel, and the court held the claim for such service a legal charge against the county, under a provision of the Revised Statutes of that state, which is as follows: "*The court shall assign counsel to defend the prisoner, in case he cannot procure counsel himself.*" WILLIAMS, J., says: "In this case the right of action in the plaintiff does not arise from an express contract, but it is necessarily given by the statute—the statute authorizes the appointment of counsel in defence of a pauper, when accused of crime—in view of the right of that counsel to compensation for the service rendered *in obedience to that law*, as an incident, necessarily attaches a liability for the services to the county, which is properly chargeable with the maintenance of the proceeding." The principle decided in that case is in harmony with the decision of the courts of this state, and carries the doctrine no further. The case of *Webb agt. Baird* (6 *Indiana*, 14), was decided by a majority of the court, DAVISON, J., dissenting. From that case it appears that the constitution of that state provides as follows: "That no man's particular services shall be demanded without just compensation." The court by assigning counsel demanded his particular services, and the same were rendered with reference to that provision of the constitution, and under an expectation of reward, and the court held that the county was liable. I have looked in vain for any constitutional or statutory provision, or decision of the courts of this state, recognizing any such claim, or from which the right to such compensation can be inferred. I confess I am unable to discover upon what equity the demand of such service of the profession without compensation, is based. In this case the rule operates with peculiar severity, as the *relator*, acting in obedience to the order of the court, and that too after applying to be excused from such

Kerr agt. McGuire.

service, devoted much of his time during a period of about three years to the successful defence of the prisoner. I have devoted considerable time to the examination of this matter, to discover some authority, if any existed, which would justify the granting of this motion, but am forced to the conclusion that the application should be to the legislature, and not to the court, which is, in my judgment, powerless to afford the *relator* the relief which he requires. The motion must be denied, but without costs, and without prejudice to any other motion or proceeding which the *relator* may desire to institute.

COURT OF APPEALS.

JOHN KERR, administrator, &c., respondent, agt. JOHN MCGUIRE, appellant.

Where, on the trial a fair question is presented to the court and jury or a referee upon conflicting evidence, whether the defendant is indebted in the amount claimed, by the plaintiff, or as admitted by himself in a certain sum less than the plaintiff's claim, and the court and jury or referee find the indebtedness to be the amount claimed by the plaintiff; the conclusion upon that question of fact is *not the subject of review in this court*.

A question put to a witness, "Do you know the general price of ale at the brewery in 1860 and 1861?" was objected to on the ground that it was too general—that it was not evidence of the market value of ale or beer alleged to have been purchased in April, May, June and July, 1861, *Held*, that the objection could not prevail, as it was not shown that the price varied during the two years; and the answer of the witness, to which no objection was taken, showed that it was the same for those years.

Another question was put to the witness, "Do you know the general market value of ale and beer during the years 1860 and 1861?" which was objected to on the ground that the price of ale and beer sold to the defendant cannot be proved by proving its general market value: *Held*, that the objection was frivolous. There was no proof of any express contract as to the price of ale sold to the defendant, and it was clearly competent to show the market value of the article.

Another question was put to a witness, who had been a book-keeper in a brewery over four years, to wit: "Do you know the general market price of ale and beer in the city of New York during the years 1860 and 1861?" which was objected to on the ground that the witness was a book-keeper—had never bought or sold

Kerr agt. McGuire.

ale or beer, and never saw any bought or sold, and was therefore incompetent to testify to its value: *Held*, that the witness had acted as book-keeper in the breweries of the city for over four years and was necessarily acquainted with the market price of beer and ale, and was competent to testify to the general market price of those articles.

The defendant was sworn as a witness on his own behalf, and was asked to state whether or not he had paid for the goods mentioned in the plaintiff's bill of particulars. The plaintiff objected to the question as tending to inquire as to transactions had between the defendant and the deceased, concerning which he was incompetent to testify; the answer was allowed, reserving the right to the plaintiff to move to strike out the testimony if improper. The defendant answered that he had paid the whole bill except \$20. On *cross-examination* the witness answered that he received the sixty hogsheads of stock ale set forth in the bill of particulars (the claim in suit for \$600), and that he paid Harrison (deceased) himself personally for them in his own store, about a week after he received them. *Held*, that the granting of the plaintiff's motion to strike out all this testimony of the defendant was not error.

The general rules of practice requiring a *written notice* to produce papers, has reference to the preliminary preparations for trial. The reason of the rule does not apply to a notice given in the presence and hearing of the court while the trial is in progress from day to day.

Therefore, where at a previous hearing before the referee, the plaintiff had given the defendant verbal notice to produce certain bills and receipts, or that parol evidence of their contents would be given: *Held*, that such notice was sufficient.

THIS action is brought to recover a balance of account alleged to be due to the plaintiff's testator for a large quantity of goods and merchandise purchased prior to the third day of August, 1861. The plaintiff's bill of particulars shows the claim to be for a balance of an entire account extending through a period of four months, viz.: April, May, June and July, 1861. The defendant claims to have paid the whole amount mentioned in the bill of particulars, except \$20.

The case was referred to B. O'Connor, as referee, to hear and determine the case. The questions to be reviewed arise on exceptions taken on the trial.

IRA D. WARREN, *for appellant*.

I. The question put to the witness Martin, "Do you know the general price of ale at the brewery in 1860 and 1861?" was improper.

Kerr agt. McGuire.

There was no evidence of the sale and delivery of any ale to the defendant. The "general price of ale at that brewery in 1860 and 1861," is not evidence of the market value of ale or beer alleged to have been purchased in April, May, June and July, 1861. It might have been much higher during other periods of the two years (*Dana agt. Fielder*, 2 *Kern*. 40). This applies to the next question at fol. 28, and also to the question at fol. 31. The price of ale and beer at Harrison's brewery, is not evidence of the market value of ale and beer in the city of New York, and was improperly admitted. It is certainly improper to inquire the market price at a particular store or brewery.

II. The question put to the witness Boardman, "Do you know the general market price of ale and beer in the city of New York during the years 1860 and 1861?" was improper. It should have been confined to the months of April, May, June and July, 1861, when the beer was bought.

The next question at fol. 35, was also improper. The witness was a book-keeper. He never bought or sold ale or beer, and never saw any bought or sold, and he was incompetent to testify to its value. The question put to the witness Kerr, at fol. 37, was improper, for the reason before stated. The beer was purchased in April, May, June and July, 1861. The question is, what was its value in 1860 and 1861, including a period of two years. (*Dana agt. Fiedler*, 1 *E. D. Smith*, 462; *Id.* 2 *Kern*. 40; *Lamoure agt. Caryl*, 4 *Denio*, 370.)

III. The plaintiff, on cross-examination of the defendant, at fol. 44, proved the delivery to the defendant by the plaintiff's testator of sixty hogsheads of stock ale, and then proved by the defendant that he paid the plaintiff's testator for those sixty hogsheads. The plaintiff then moved, at fol. 45, to strike out this testimony, which the referee did. In this we say the referee erred. The plaintiff called out new matter to charge the defendant with sixty hogsheads of stock ale. He had a right to discharge him-

Kerr agt. McGuire.

self by proving payment, the plaintiff having called it out in answer to a direct question. The plaintiff went on and further cross-examined this witness, and then moved at fol. 48, to strike it out, which the referee did. In this the referee also erred. "A party's declarations in his own favor, though generally inadmissible, are evidence in his favor when called out by his opponent." This rule should be strictly applied in a case like this, where the defendant cannot be a witness in his own behalf unless the plaintiff chooses to call him. (*Cowen & Hill's Notes to Phillip's Evidence*, latter part of note 117, and cases cited; 1 *Starkie on Evidence*, 144, 145, § 27.)

The only right the plaintiff reserved to strike out the defendant's testimony was to the question at fol. 40. The remainder of the examination was voluntary, and he had no right to strike it out.

IV. At fol. 64, the plaintiff, under the defendant's objection, was allowed to prove the contents of a bill alleged to have been left with the defendant. No written notice to produce the bill was ever given. Where a notice is required, it must be a written notice in all cases (*Code*, § 408). Had the notice given verbally been in writing, it would not have been sufficient. It calls for all bills and receipts, without specifying any. (*Grimm agt. Hamel*, 2 *Hil.* 434; *Millard agt. Germer*, 1 *Sand.* 50.)

V. The finding of the referee was against the weight of evidence. The witness Magher, swears that he saw the defendant pay Harrison \$580 for stock ale. Terrence Clark swears that he was present and saw it. The defendant swears that he owed the plaintiff, as such executor, only \$20 at the time this suit was commenced. Here are three witnesses, entirely unimpeached, who prove that \$580 was paid for this stock ale, which payment does not appear in the bill of particulars (25 *N. Y.* 363). The plaintiff, on the other hand undertakes to prove the defendant's admissions that he owed \$600, by Thomas Wallace and George

Kerr agt. McGuire.

Kinnier. Kinnier swears that the defendant said he "owed them some \$600." At fols. 74 and 75, he attempts three times to tell what the defendant said, and does not tell it twice alike. Such testimony, which is all that the plaintiff has, as against positive proof, is entitled to no credit. In the language of Mr. Justice HARRIS, "it is so easy, too, by the slightest mistake or failure of recollection, totally to pervert the meaning of the party, and to change the effect of his declarations, that all experience in the administration of justice has proved it to be the most dangerous kind of evidence" (*Garrison agt. Akin*, 2 Barb. 28). The defendant swears he told these witnesses he "formerly" owed Harrison \$600 (*Thompson agt. Monk*, 22 How. 431).

VI. This judgment should be reversed.

H. W. ROBINSON, *for respondent*.

I. The complaint alleged the sale and delivery by the testator to the defendant of divers large quantities of goods and merchandize, consisting of ale and beer, and stock ale, and that the defendant remained indebted therefor, and for a balance of account in the sum of six hundred dollars, and had promised to pay the same. The answer admits the sale and delivery of the goods referred to, and alleges for defence to the cause of action set out in the complaint, that he had *paid* the testator for all the ale, beer, and stock ale he had ever purchased, except a small balance of about twenty dollars, and denies that he was indebted to the plaintiff "for balance of account in the sum of six hundred dollars, or that he ever promised to pay the same."

The other allegations in the answer, that the price of the goods set out in the bill of particulars was more than he agreed to pay the testator, and his denial of the charges as therein stated are not addressed to any allegations in the complaint, and are of no avail. (*Kreiss agt. Seligman*, 8 Barb., 440; *Dibble agt. Kempshall*, 2 Hill, 124.)

Kerr agt. McGuire.

The answer was evasive, and the mere denial of indebtedness "in the sum of six hundred dollars," except for the defence of *payment*, constituted no denial, but that the balance of account was at least \$599.99. No issue is made by the pleading except the defence of *payment*.

The issues and judgment are entirely to be regulated by the matters *alleged* and *proved*. (*Field* agt. *The Mayor, &c.*, 2 *Seld.*, 124; *Texier* agt. *Gonin*, 5 *Duer*, 392.)

II. As to the defence of *payment*, the proof before the referee abundantly showed the indebtedness of the defendant in the amount claimed, by his repeated promises to pay.

Testimony of John Boyd, fol. 33.

do do Thomas Wallace, fols. 64 to 69.

do do Georgr. Kinnier, fols. 72 to 76.

And the entire question presented to the referee being one of fact, his conclusion upon conflicting evidence is not the subject of review in this court.

III. But if in any view, the affirmative rested with the respondent, to establish the account to the extent claimed, the exceptions taken by the appellant were frivolous.

As to the exception at folio 27, the question whether or not the witness Martin, "knew the price of ale at the brewery in 1860 and 1861?" was merely preliminary to other proof, and his knowledge or want of knowledge on the subject might have been immaterial, unless the appellant could also be charged with acts or knowledge in relation to the subject inquired of. The question was not objected to on that ground, and *no objection* was made to the subsequent statement by the witness of the principal fact, or that it was too general as to time.

As to the exceptions at fols. 32 and 38, the same answer will apply.

As to the exceptions at folios 45 and 48, it appears that the witness testified on his own behalf at folio 40, to having paid for the goods; the objection was then taken by

Kerr agt. McGuire.

respondent's counsel, that he was incompetent to testify as to transactions had personally between himself and the testator; the referee allowed the answer, but reserved to respondent's counsel the right to move to strike out such testimony when it should appear that it was a "transaction *personally* between the deceased person (testator), and the witness" (Code, § 399). When this fact was elicited on cross-examination, the inadmissibility of the testimony given on direct-examination became apparent, and was properly stricken out.

As to the exception at fol. 65, to secondary evidence of the contents of a bill rendered the appellant, notice had been verbally given on a previous meeting before the referee to produce all bills rendered relating to the ale in controversy.

The general rule of practice, requiring a written notice to produce papers, has reference to the preliminary preparations for trial. The reason for the rule does not apply to a notice given in the presence and hearing of the court, while the trial is in progress from day to day, and the materiality and pertinency of the document is apparent, and each party is at least presumed to have present all papers bearing on the case. The notice referred to in section 408 of the Code, has only reference to notices required by its provisions.

No objection was made that the notice was not sufficiently specific. The practice of giving such notices, universally prevails at the circuit.

IV. The judgment should be affirmed with costs, and damages for the delay.

WRIGHT, J. The answer of the defendant admitted the purchase from the plaintiff's testator of the ale, beer and stock ale mentioned in the complaint, and in the bill of particulars furnished by the plaintiff, but alleges that he had paid the deceased in his life time for all the same,

Kerr agt. McGuire.

except a balance of about twenty dollars. No issue was raised by the pleadings except the single one of payment. The allegation in the answer that the price of the goods set out in the bill of particulars, was more than the defendant agreed to pay the testator, and his denial of the charges as therein stated, are not addressed to any allegations in the complaint, and are of no avail. Upon the question of payment there was a preponderance of proof against the defendant. At least it was a fair question presented to the referee upon conflicting evidence, whether the defendant was indebted in the amount claimed of \$600, or as admitted by himself, in the sum of twenty dollars. The referee found the indebtedness to be \$600, and his conclusion upon that question of fact is not the subject of review in this court. Various objections were interposed on the trial to questions propounded to the plaintiff's witnesses, which will be briefly noticed. One Martin, a brewer, who was in the employ of the deceased at the time of his death, and had been for six or seven years prior thereto; who made sales and collections for deceased, who knew of the defendant's purchasing ale and who was acquainted with the prices of Harrison's ale in 1860 and 1861, was asked the question, "Did you know the general price of ale at the brewery in 1860 and 1861?" The question was objected to, as being too general and as incompetent and improper. No objection was made to the subsequent statement of the witness as to the principal fact or that it was too general as to time. The exception was not available. The question was proper enough in itself. The ground of the objection was that it was too general, meaning that the inquiry as to time extended over too great a period of time; but it was not shown or even suggested, that the price varied during the time, two years; and this answer to which no objection was taken showed that it was the same for 1860 and 1861. It is now claimed that there was no evidence of sale and delivery of any ale

Kerr agt. McGuire.

to the defendant, but this ground was not urged on the trial. It would indeed have availed nothing if it had been. It was substantially admitted by the pleadings, that Harrison in his life time and before the 3d day of August 1861, sold and delivered to the defendant divers large quantities of ale, and beer and stock ale. A further question was put to the same witness, viz: "Did you know the general market value of ale and beer during those periods?" The ground of objection to this question was that the price of ale sold to the defendant cannot be proved by proving its general market value. The objection was frivolous. It would have been equally so, had it been made to the answer elicited. There was no proof of any express contract as to the price of the ale sold to the defendant, and it was clearly competent to show the market value of the articles. The same answers will apply to a similar question put to the plaintiff Kerr. A witness named Boyd, who was a brewer, and who was in the employ of Harrison in May 1861, made sales, and having the general superintendence of the business was asked, "Did you know the general price of ale and beer at Wm. Harrison's brewery during May 1861, while you were there?" The objection here was that the price of ale sold to the defendant cannot be proved by proving the general price at that brewery. The answer was not objected to. The question was not improper for the reason assigned. It was merely preliminary to other points, and the witness's knowledge or want of knowledge on this subject might have been immaterial unless the defendant could also be charged with act or knowledge in relation to the subject inquired of. The question was not objected to on this ground, and no objection was made to the answer of the witness. A witness named Boardman, testified that he had been a book-keeper in a brewery over four years, a part of the time in Harrison's brewery, and knew of the defendant's purchasing ale of Harrison. He was asked, "Do you know the general market price of ale

Kearr agt. McGuire.

and beer in the city of New York during the years 1860 and 1861?" The question was objected to by the defendant on the ground that the witness was not competent to testify to the market value. Here again the exception was pointed to the question whether the witness had knowledge of the general market price. He had acted as a book-keeper in the breweries of the city for over four years, and was necessarily acquainted with the market price of beer and ale.

The defendant was sworn as a witness on his own behalf. The bill of particulars furnished by the plaintiff was placed in his hands, he was asked to state whether or not he had paid for the goods therein mentioned. In the bill there was a charge under the dates of 18th and 20th May, 1861, of sixty hogsheads of stock ale at \$10 per hogshead, amounting to \$600. The plaintiff's counsel objected to the question as tending to inquire of the witness, who is party defendant, as to transactions had between himself and the deceased, concerning which the witness was incompetent to testify.

The referee decided to hear the answer, reserving the right to the plaintiff to move to strike out the testimony if improper. The defendant answered that he had paid the whole of the bill except twenty dollars. On cross-examination the witness answered that he received the sixty hogsheads of stock ale, set forth in the bill of particulars, and that he paid Harrison himself personally for them in his own store, about a week after he received them. The motion was then made to strike out all the testimony of the witness relating to transactions he had personally with the deceased, which was granted. This was not error.

The Code provides that a party to an action may be examined as a witness on his own behalf, except as against parties who are representatives of a deceased person, in respect to any transactions had personally between the

Kerr agt. McGuire.

deceased person and the witness (*Code*, §395.) The witness was inquired of whether he had paid for the goods mentioned in the bill of particulars. There was nothing in the question indicating a transaction had personally between the defendant and the deceased, and the testimony was allowed to be taken, reserving to the plaintiff the right to move to strike it out if not approved. The answer of the witness, that he had paid for all the goods, except twenty dollars, showed no transaction had between the witness and the testator. But, when the cross-examination elicited the fact that the witness, on his direct examination, as to payments, had been speaking of transactions had by himself personally with the deceased, the inadmissibility of the testimony given on the direct examination becomes apparent and was properly stricken out. The defendant's counsel does not claim that the testimony of the defendant, in respect to a transaction personally between Harrison and the witness, is admissible, but insists that the plaintiff, on cross-examination, called out new matter to charge the defendant with sixty hogsheads of stock ale, and that he had the right to discharge himself by proving payment, the plaintiff having called it out in answer to a direct question. But the plaintiff called out no new matter. The sixty hogsheads of stock ale formed part of the goods which, on direct examination, the witness testified that he had paid for; so that his attention was properly called to that item on cross-examination; and it then appears that the payments he had mentioned were transactions had personally by himself with the deceased, the motion to strike out was properly made and granted. Indeed, if it had been improperly granted, it would not necessarily have followed that there should be a new trial. It fully appears from the case that the only item in the controversy was the sixty hogsheads of stock ale, valued at \$600. It was conceded that the ale had been received by the defendant, he claiming that \$580

Kerr agt. McGuire.

had been paid thereon, whilst the administrator claimed the whole amount to be due. The defendant was allowed to testify that he owed the estate of Harrison twenty dollars for stock ale, and no more, and generally that all he owed the estate was twenty dollars. So that the defendant had the full benefit of the testimony stricken out on motion in the early stage of the trial.

A witness testified that he was in Harrison's employ at the time of his death, and was also employed by the executor after his death. That he presented a bill to the defendant after Harrison's death, and left it with him. The plaintiff's counsel called for the production of the bill, and the defendant stated that he had not the bill present. The witness was then asked, "For what and for what amount was that debt?"

This was objected to by the defendant, on the ground that he had no notice to produce the bill, and that the contents cannot be proved by parol. The counsel for the plaintiff showed that at a previous meeting before the referee, on the reference he had given the defendant verbal notice to produce all bills rendered and receipts given to the defendant, relating to the ale in controversy, or that parol evidence of their contents would be given; the objection was overruled and the defendant excepted.

This ruling is now claimed to be erroneous, on the grounds: 1st. That the notice was verbal, a written notice being required by the Code in all cases. 2d. That the notice given was not sufficiently specific. On neither ground is the exception available. The notice referred to in § 408 of the Code has only reference to notices required by its provisions; and no objection was made on the trial that the notice given was not sufficiently specific.

The general rule of practice requiring a written notice to produce papers has reference to the preliminary preparations for trial. The reason of the rule does not apply to a notice given in the presence and hearing of the court

Heintz agt. Dellinger.

while the trial is in progress, from day to day, and the materiality and pertinency of the document is apparent, and each party is at least presumed to have present all papers bearing on the case.

I am of opinion that no legal error was committed by the referee to the prejudice of the defendant, and the judgment should be affirmed.

SUPREME COURT.

JOHN HEINTZ agt. JOHN DELLINGER.

Where in an action for *trespass on land*, the metes and bounds of the premises claimed to be owned by the plaintiff are set out in the complaint, and the defendant, in his answer, admits that the plaintiff is the owner of the premises thus described, but denies that the alleged trespass is upon such premises; the issue on the trial is one of *location*, depending upon the accuracy of measurement, and does not involve the *question of title*.

Erie Special Term, October, 1864.

THIS is an application for a certificate of the court showing that title to land came in question on the trial of this cause (*Code*, § 304, *sub.* 1). The trial took place at the circuit court in Genesee county, in June, 1864. In the complaint, the plaintiff set forth by metes and bounds, a description of certain real estate, which he claimed to own, and on which it was alleged the defendant had trespassed. The defendant in his answer admitted that the plaintiff was the owner of the property thus described. Upon the trial it appeared that the parties were occupants of adjoining lots in the village of Batavia, and the trespass complained of consisted in the erection of a wooden addition to the defendant's building, made upon the rear of the lot occupied by him. The plaintiff claimed that it extended over upon the land described in the complaint, which the defendant denied. Aside from the question of damages, that was

Heints agt. Dellinger.

the issue presented and tried at the circuit. The jury decided it in favor of the plaintiff, but rendered their verdict for less than fifty dollars damages.

M. F. ROBERTSON, *for plaintiff*.

GEO. BOWEN, *for defendant*.

DANIELS, J. The evidence before the court and jury upon that question consisted chiefly of measurements of certain distances. By those made and proven on behalf of the plaintiff, the defendant's addition was shown to extend over upon the premises described in the complaint, while those on the part of the defendant excluded it from them. The question became, therefore, one of location solely, depending upon the accuracy of the respective measurements. If those relied upon by the plaintiff were correct, the effect of the defendant's answer was to admit that the addition was over upon the plaintiff's land, and it consequently followed that the trespass had been committed. If they were not correct, and those relied upon by the defendant were, then it became entirely immaterial upon whose land he had built, for the plaintiff had no cause of complaint on account of it. The question thus presented and litigated, was, therefore, not one of title, but merely one of location, for the purpose of ascertaining whether the piece of land on which it was claimed the defendant had trespassed, was a portion of that which he admitted was owned by the plaintiff. That brought the controversy to one which concerned the possession only. For when it was satisfactorily shown to be a part of that described in the complaint, it followed that it was in the plaintiff's possession at the time of the trespass. If the lines of the land are properly laid as claimed by the plaintiff, the title which the defendant's answer admitted, drew after it a constructive possession (*Dewey agt. Bordwell*, 9 *Wend.* 65). The production of the plaintiff's deed could make no differ-

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

ence, for it would be of no use as evidence where the title and description were fully ascertained by the pleadings.

In *Ehle agt. Quackenboss* (6 *Hill*, 539), this court held that the term "title," as used in the statute under consideration, is limited to the right of possession. In this case the inquiry was as to the fact, not the right of possession. For when the fact was ascertained to be as the plaintiff alleged it, the right stood admitted. (*Idem*, 540; see also *Ford agt. Sampson*, 17 *How*. 447.)

The application made must be denied.

COURT OF APPEALS.

THE BRITISH COMMERCIAL LIFE INSURANCE COMPANY agt. THE COMMISSIONERS OF TAXES AND ASSESSMENTS FOR THE CITY AND COUNTY OF NEW YORK.

It is settled by the decision of the United States Court in the case of *The People ex rel. Bank of Commerce agt. Commissioners of Taxes of New York* (25 *How. Pr. R.* 9,) that stocks of the United States, are exempt from state taxation.

The place of assessment, for the purposes of taxation of a foreign corporation doing business in this state, is where the operations of the corporation are carried on—not at the residence of the comptroller of the state, who has charge of the securities deposited by such corporation under the statute.

Corporations, are to be included under the general term "persons," in regard to their liability to taxation in the place where they carry on their business.

A foreign corporation, (British commercial life insurance company) doing business in this state, is liable to be taxed upon the bonds of this state—bonds of the city of Buffalo—deposited with the comptroller of this state, under the statute provided for that purpose. Such bonds are included under the term *personal estate* as used in the statute; and they must be considered "*property invested in any manner in the business which they carry on,*" under the statute of 1855.

September Term, 1864.

THE relators are a corporation, incorporated by act of parliament of the united kingdom of Great Britain and Ireland, passed in 1821, and authorized by their charter to make insurance on lives. They have never been incorpo-

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

rated in this state, but have twenty-eight agencies here for the purpose of receiving applications for insurance.

The agents receive applications for insurance, and, upon approval of the risks by the directors in England, the policies are there made out and transmitted to the agents here, who transmit to the company the premiums received by them. The losses are paid through the agents.

The relators deposited with the comptroller of this state, pursuant to the provisions of the act of June 24, 1853, the sum of \$100,000, consisting of \$50,000 of the bonds of the city of Buffalo, and \$50,000 of the public stocks of the United States of America. (*Laws* 1853, pp. 888, 889, §§ 6, 7, pp. 1029, 1030, and pp. 893, 894, § 15.)

On the 27th of February, 1855, an act was passed providing for the assessment and taxation of all persons and associations not residents of this state, doing business in this state, "on all sums invested in any manner in said business, the same as if they were residents of this state," &c. (*Laws* of 1855, p. 44.)

The deputy tax commissioners for the year 1857-8, under the direction of the commissioners of taxes and assessments, within the time required by law, assessed the personal property of the relators at \$100,000. (*Vol.* 2, *Laws* of 1857, pp. 498, 499, § 10.)

The principal office or agency of the relators is in the first ward of the city of New York.

Application was made to the commissioners to strike out said assessment, which was denied. The relators obtained a certiorari under section 24 of the act of April 16, 1857. Defendants made return to the writ. (*Laws* of 1857, vol. 2, p. 503.)

Judgment was rendered at the special term of the supreme court, reversing the proceedings of the commissioners as to the \$50,000 of the United States stock, and affirming the assessment in respect to the \$50,000 of Buf-

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

falo city bonds. The general term affirmed the decision of the special term. Both parties have appealed to this court.

CHARLES A. RAPALLO, *for plaintiffs.*

I. The assessment in question is invalid, unless the authority to impose it can be found in the act of Feb. 27, 1855, which is in the following words :

§ 1. "All persons and associations doing business in the State of New York as merchants, bankers, or otherwise, either as principals or partners, whether special or otherwise, and not residents of this state, shall be assessed and taxed on all sums invested in any manner in said business, in the same manner as if they were residents of this state; and said taxes shall be collected from the property of the firms, persons or associations to which they severally belong." (*Session Laws of 1855, chap. 37; 1 R. S. 5th ed. p. 905, § 2.*)

1. At the time of the passage of the act of 1855, the personal property of foreign corporations was exempt from taxation.

(a) By 1 *R. S. (5th ed.)*, p. 906, *sec. 5, (Part 1, chap. 13, tit. 1)*, it is enacted that, "The following property shall be exempt from taxation :"

Sub. 7. The personal property of every incorporated company not made liable to taxation on its capital in the 4th title of this chapter.

(b) Title 4 of chap. 13 (1 *R. S. 5th ed. p. 944*), contains no provisions applicable to foreign corporations.

It cannot be contended that the legislature intended chapter 4 to apply to foreign corporations. If it did, the entire capital of this company, which is situated in England, and consists of several millions, and the capital of every corporation in the world, would be liable to taxation in this state.

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

2. There was no manner provided for assessing a non-resident or a foreign corporation in respect of personal property situated in this state.

(a) "Persons" could only be assessed in the towns or wards where they resided.

(b) Corporations liable to taxation upon their capital, were to be assessed in the towns or wards of their principal office, &c.

There was no provision for the assessment of corporations other than those liable to taxation upon their capital (*See 1 R. S. p. 908, 5th ed.*). *Mem.* In § 5 the word "of" is misprinted "or," as will appear by reference to the session laws and to the opinion of Ch. J. Comstock in the case of *Hoyt*.

3. Statutes were in force at that time expressly providing for the taxation of foreign insurance companies, and establishing the manner of such taxation; i. e., by requiring them to pay a percentage on the premiums earned here. (*Laws of 1824, chap. 277; Id. 1827, 1 R. S. 974; Id. 1829, chap. 336; Id. 1837, chap. 30; Id. 1849, chap. 178.*)

II. The act of 1855 does not authorize the assessment in question.

It does not in terms apply, nor can it be inferred that it was intended to apply, to foreign corporations.

It was intended to meet the case of natural persons, concerned in partnerships or unincorporated associations, who personally transacted their business and managed their capital in this state, under the protection of its laws, while residing beyond its limits, and thus evaded taxation.

1. It does not mention "foreign corporations," although those are words of great frequency in our statutes.

2. It is, apparently with care, confined to "persons," and "associations."

(a) The term "persons" when used in the statutes of this state, does not, in general, include corporations, other-

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

wise the legislature would not have considered it necessary to enact special provisions, declaring in what cases the term "persons" shall be deemed to include corporations, as in the following instances: *R. S., part 4, chap. 1, title 7, § 40* (3 *R. S. 5th ed. p. 990, § 46*); it is enacted that the term "person," when used in that chapter, shall be construed to include public and private corporations.

By the acts in relation to unauthorized banking (2 *R. S., 5th ed. p. 981*), "persons" are prohibited from becoming members of companies formed, or to be formed, for the purpose of unauthorized banking. Incorporated companies are prohibited from employing their effects in such business. The terms person, association of persons, body corporate, &c., are used as having different significations.

The statutes relating to proceedings against non-residents and foreign corporations recognize the distinction between them.

The statutes in relation to insurances (2 *R. S. 5th ed. pp. 983, 984*), separately enumerate "person," "association" and "incorporation established in a foreign country."

The distinction between these terms is especially observable in the laws relating to taxation. By the act of 1857, ch. 176 (1 *R. S. 5th ed. p. 908*), every "person" shall be assessed in respect of his personal property in the town or ward where he resides.

All the personal estate of every "incorporated company liable to taxation on its capital" shall be assessed in the town or ward where its principal office, &c., shall be. 1 *R. S. (5th ed. p. 912, 1857)*, section 23, declares that the term "person" or "persons," when used in certain sections of the law relating to taxation shall be construed to include corporations ("*expressio unius, exclusio alterius*").

The term "association" does not describe a corporation, unless the term "incorporation" be added to it. It means only persons who are associated together. A corporation is a unit, a being created by the law, known by a particu-

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

lar name, deriving its powers and attributes from the law which creates it, and not from the persons who are corporators, and liable to be proceeded against, under laws expressly applicable to corporations.

A mere association, on the contrary, derives its powers from the individuals who compose it. Associations and corporations are totally distinct from each other in their origin, constitution and characteristics.

3. The context of the act shows that it was not intended to apply, and is not applicable, to corporations.

(a) "Doing business as principals, or partners." Doing business as a principal excludes the idea of any agency. That term applies evidently to natural persons transacting their own business. Doing business as partners also applies to individuals only.

(b) "Not residents of this state." The term residence is not applicable to corporations, except when the question of citizenship arises. In the tax laws it has no such application.

(c) The manner indicated in the act of 1855, for assessing the taxes authorized by that act, shows that that act was not intended to be applicable to corporations. "They shall be assessed in the same manner as if they were residents of this state"—not in the same manner as if they were corporations created under the laws of this state.

Under the tax laws, as revised in 1813 (2 R. L. 509, §§ 1 and 2), all personal estate of persons residing in this state was taxable.

It was never held that corporations were taxable under that provision.

(d) The provisions as to the place of taxation shows that the term "residence," when used in the tax laws, is not deemed applicable to corporations. "Individuals" are taxable in the town or ward where they reside; "corporations liable to taxation on their capital" in the town or ward where their principal office, &c., is situated.

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

III. The absence of any reference in the act of 1855, to the then existing laws in regard to the taxation of foreign fire and marine insurance companies, shows that the act was not intended to apply to those companies, or to change the existing laws respecting them.

IV. If the act of 1855 applied to the plaintiffs it applied to all foreign corporations, including fire and marine insurance companies, and subjected them to a double tax.

This cannot be supposed to have been the intention of the legislature.

V. The taxation of insurance companies incorporated in foreign countries, having been already regulated by specific laws, which were in force at the time of the passage of the act of 1855, that subject, in the absence of any repeal of those special regulations, cannot be deemed to have been embraced in the general terms employed in the act of 1855, especially when the terms so employed are not, in their common and ordinary sense, applicable to such companies.

VI. The acts of 1857 and 1858, regulating the taxation of foreign insurance companies, exclude the idea that the act of 1855 applied to such companies, and show that the legislature deemed the separate system of taxation established in respect to such companies as still continuing.

VII. The provisions of the act of 1857, last referred to, restrict the right to tax the assets of foreign corporations to cases where they have not less than \$300,000, invested in this state. This amount is, by the amendment of 1858, reduced to \$150,000, and it is provided that when the assets are below that amount, the only tax which can be imposed is two per cent upon premiums.

The case before the court does not come within any of those provisions.

VIII. The case before the court is not one of those at which the act of 1855 was aimed. The object of that act was to reach individuals transacting their own business in

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

this state, and having their residences outside of its limits. This appears from the language of the act, which declares that they shall be taxed "in the same manner as if they were residents of this state."

The subject of taxing corporations, foreign and domestic, was already provided for by a system adapted to that specific subject. If the legislature have omitted to embrace, in those provisions, foreign life insurance companies, the omission cannot be supplied by the court.

IX. In no event could the deposit in question be taxed in the city of New York. The provisions for taxing corporations, where their principal place of business is situated, only apply to such corporations as are taxable on their capital, under title 4 of chapter 13, of part 1 of the R. S.

The manner of assessing the tax is declared by the act of 1855 to be, not that provided for assessing corporations, but that they shall be assessed "the same as if they were residents of this state."

Therefore, if the deposit in question is taxable at all, it can only be taxed by assessing the comptroller in respect of it as trustee, and that assessment must be made at the place of his residence, and the tax imposed at the comparatively moderate rate of taxation prevailing there, instead of the extravagant one to which the residents of the city of New York are subjected.

X. The deposit, in question, is not a sum invested in business. The sum is invested in the stocks in question. It is withdrawn from business and separated from the other assets of the company. It is a special trust fund, placed in the hands of the comptroller, not subject to the control of the company or to the claims of its general creditors, but declared by law to be merely a security to its policyholders, resident in the United States. (*Act of June 24, 1863, ch. 463, § 6.*) The fund in question is not, therefore, such a one as is intended by the act of 1855.

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

XI. The policy of the state, as declared in the act of 1851, is to encourage the investment of foreign capital in our securities.

Capital transmitted here for such investment is by that act expressly exempted from taxation (*Laws of 1851, ch.*).

XII. The decision of the general term, in respect to the \$50,000 of United States stock, should be affirmed.

This case is distinguishable from that of the *Bank of the Commonwealth*. There, the tax was imposed upon the capital of the bank, and the amount of that capital was to be fixed at the actual value of the capital stock, subject to certain deductions, enumerated in the statute. The United States stock was one of the elements of the value of the stock of the bank, and indirectly contributed to increase the tax, but it was not itself the subject of taxation, and, therefore, did not fall within the decision in the case of *Weston agt. The City of Charleston*.

Here the case is different. If the tax can be assessed at all, it is assessable directly upon the deposit, consisting of United States stocks, and, therefore, falls within the decision of the supreme court of the United States, in the case of *Weston*.

XIII. The judgment as to the Buffalo city stocks should be reversed, and costs should be awarded to the plaintiffs on both appeals.

A. R. LAWRENCE, JR., *for defendants*.

First—The relators having demurred to the return to the writ of certiorari, all the facts stated in the return must, for the purposes of this appeal, be taken as true. If, therefore, there is any conflict between the petition on which the writ was obtained and the return on a matter of fact, the return must prevail. (*See Return, Case, pp. 6, 7; Demurrer to Case, p. 13, fol. 48.*)

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

Second—The return states, as a matter of fact, that the principal office or agency of the company in this state is in the first ward of the city of New York.

If there was any authority, therefore, for making an assessment upon the stock deposited by the relators with the comptroller, the assessment was properly made in the city of New York, as and for property situated in the first ward. (1 R. S. p. 390, 1st ed.; 1. R. S. p. 909, 5th ed.)

Third—The relators are within the class subjected to taxation by the act of the legislature of this state, passed February 27, 1855, entitled, "An act amendatory of the acts for the assessment and collection of taxes."

(a.) The phraseology is applicable to foreign companies doing business in this state, whether incorporated or unincorporated.

The term "person" includes a corporation. (*United States agt. Amedy*, 11 Wheat. 392; *People agt. Utica Ins. Co.* 15 Johns. 358; *Clinton, &c. Manuf. Co. agt. Morse*, cited in above; *Angell & Ames on Corp'ns*, pp. 472, 473, § 441; *State of Indiana agt. Woram*, 6 Hill, 33.)

In the case of the *People agt. The Utica Insurance Company (supra)*, THOMPSON, J., says: "It was decided by this court in the case of the *Clinton Woolen and Manufacturing Company agt. Morse & Bennett* (October Term, 1817), that under the act for the assessment and collection of taxes, corporations are liable to be taxed for property owned by them. Yet the act speaks only of 'persons' liable to be assessed, and the term corporation is not used at all."

And a corporation has been held to be an "inhabitant," within the meaning of the tax laws. (*Ontario Bank agt. Bunnell*, 10 Wend. 186; *Sherwood agt. Saratoga &c. R. R. Co.* 15 Barb., 657; *Cowper's Rep.* 78.)

Also to be an "occupier," within the meaning of statutes relative to taxation employing that term. (*See cases cited by NELSON, J., in Ontario Bank agt. Bunnell.*)

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

(b.) The term "associations" includes corporations. Association simply means "the act of associating, union, connection of persons."

The "associations" under the banking law of 1838 were held by the supreme court to be "corporations." (*People agt. Watertown*, 1 *Hill*, 620; *Sandford agt. Supervisors*, DAVIES, J., 15 *Howard's P. R.* 172.)

By the constitution, a "corporation" includes any "association" possessing any other powers than a partnership (*Article 8, § 2*).

The citation of the counsel for the relators (in the points presented to the commissioners, case, p. 12, fols. 43, 44), from the act of 1837, relative to "unauthorized banking," shows that the legislature considered the term "associations" as embracing "corporations," because, in speaking of "association," the term is qualified by the addition of the words, "of persons not incorporated."

What necessity could there have been for this qualification, if the term "association" did not, if unqualified, embrace incorporations.

In fact, the term "association" is a broader and more comprehensive term than "corporation," inasmuch as it embraces all aggregations of individuals for business purposes, other than simple partnerships, whether incorporated or unincorporated.

Again, as the terms "person" and "association" have been heretofore construed, in acts relating to the assessment of taxes, to embrace a "corporation," there is no reason why, in the absence of any clearly expressed intention on the part of the legislature to restrict the operation of the act of 1855 to unincorporated companies or natural persons, the courts should give such a construction to that act.

The spirit of that act is to subject individuals, whether incorporated or unincorporated, whether partnerships or associations, or natural persons, who are not residents of

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

this state, but are doing business therein, in any way, to taxation on all sums invested in their business here; and there certainly can be no good reason for exempting from the operation of the statute any body of individuals, which, according to the recognized rules of construction, should be embraced in the language of the statute.

Fourth—It being established that the relators are within the class subjected to taxation by the act of 1855, the next question is, are they doing business in this state, within the meaning of that act?

(a.) We insist that the relators are doing business in this state through their agents.

They have twenty-eight agencies in this state, for the purpose of receiving applications for insurance, for transmitting the applications to England, and for delivering the policies if the risks are approved by the company, and also for collecting the premiums for such policies, and for paying the losses when allowed by the directors in England.

All these acts are business matters of the company, and, indeed, the most essential part of the business of the company, so far as its operations in this state are concerned, and it is difficult to conceive how it can be contended that a company engaged in such operations, through its agents, is not engaged in the transaction of business here.

Fifth—If we have succeeded in showing that the relators are embraced in the class subjected to taxation by the act of 1855, and that they are engaged, through their agents, in the transaction of business in this state, it follows that they stand in the same position in reference to liability to taxation upon sums invested in business here as "corporations" or "associations" created or organized under the laws of this state. (*Laws of 1855, p. 44; Opinion of Supreme Court, case, p. 26; International Life Insurance Co. agt. Commissioners of Taxes, 28 Barb. 318.*)

Two questions then remain to be considered:

1st. Whether a corporation or an association, organized

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

and doing business under the laws of this state, would be liable to taxation upon a similar deposit to that involved in this case; and,

2d. Whether the sum of one hundred thousand dollars, invested in the stocks deposited with the comptroller, is to be considered as invested in the business of the relators in this state.

A. As to the first question:

The sixth section of the act, entitled, "an act to provide for the incorporation of life and health insurance companies, and in relation to agencies of such companies," passed June 24, 1853, as amended July 18, 1853 (*Laws of 1853, pp. 888, 889, 1029, 1030*), provides that "no company shall be organized under this act, for the purposes mentioned in the first department, with a less capital than \$100,000. * * * The whole capital of such company shall, before proceeding to business, be paid in and invested in stocks of the United States, or of the state of New York, &c. * * * No company organized for the purposes mentioned in the first department shall commence business until they have deposited with the comptroller of this state the sum of one hundred thousand dollars in the stocks or securities before mentioned. * * * The comptroller shall hold such stocks or securities as security for policy holders in said companies" (*See Laws of 1853, pp. 888, 889, § 6, as amended by Laws of 1853, pp. 1029, 1030*).

The act further provides, that "whenever the corporators shall have fully organized such company, and the said company have deposited with the comptroller the requisite amount of capital, it shall become his duty to furnish the corporation with a certificate of such deposit, which, &c., shall be the authority to commence business and issue policies," &c. (*Laws of 1853, p. 889, § 7*).

Here we have a distinct declaration, on the part of the legislature, that the stocks deposited with the comptroller by companies organized under the laws of this state are

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

the capital of such companies. (*Opinion Supreme Court, case, pp. 24, 27; International Life Insurance Co. agt. Commissioners of Taxes, 28 Barb. 318.*)

It follows, then, as a matter of course, that such stocks are liable to taxation, as the capital of such companies, under the provisions of the Revised Statutes. (1 R. S. p. 944, 5th ed.; 1 R. S. p. 414, 3d ed.)

It is also obvious, from the further provisions of the act of 1853, aforesaid, that the legislature regarded the deposit made by foreign life insurance companies as precisely of the same character as the deposit by the other companies.

The 15th section of the act aforesaid provides that, "it shall not be lawful for any person to act, in this state, as agent or otherwise, in procuring applications for life or health insurance, or in any manner to aid in transacting the business of any life or health insurance company, incorporated by or organized under the laws of any foreign government, until such company have deposited with the comptroller of this state, for the benefit of the policy-holders of such company, citizens or residents of the United States, securities to the amount of one hundred thousand dollars, of the kind required by section sixth for similar companies of this state," &c. (*Laws of 1853, p. 893*).

The section then goes on to provide that the company shall appoint an attorney on whom process can be served, and that when he has filed with the comptroller a certified copy of the charter, and of the vote or resolution of the trustees appointing him attorney, the comptroller shall give a certificate to that effect, &c., which certificate, when filed, &c., shall be the authority to commence business (*Laws of 1853, p. 893*).

It thus appears that the deposit by a foreign company is intended to secure the same class of persons as the deposit of the other companies—to wit, the policy-holders in this state, or of the United States; that it is made the fund to which the policy-holders are to resort for payment

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

of their claims, and that it is made a condition precedent to the right of the company to transact business, as well in the case of the former as in the latter.

Can there be any reason, then, for saying that, as the deposits in both cases are intended for the same purposes, they should not bear the same burthens?

Again, apart from the provisions of the statute of 1853, which define the deposit in question to be capital, such deposit would be considered the capital of the appellants, on general legal principles. As we have above shown, the object of making the deposit is to provide a fund, out of which the policy-holders may receive payment of any claims that they may have against the company (*Laws of 1853, p. 893, § 15*).

This court has, in the case of *The Mutual Insurance Company agt. Supervisors of Erie*, (4 *Comstock*, 448,) defined the capital of a corporation or association to be the fund upon which it transacts its business, which would be liable to its creditors, and, in case of insolvency, pass to a receiver. (*International Life Ins. Co. agt. Com's of Taxes*, 28 *Barb.* 318; *Opinion of Supreme Court, case, p. 25*.)

It seems clear, then, that a company created under the laws of this state would be liable to be taxed upon a similar deposit.

B. As to the second question :

The commissioners contend that the money invested in the stocks deposited by the relators with the comptroller is invested in their business in this state, even if it cannot properly be considered as capital. The legislature in using the terms "sums invested in any manner in said business," seem to have sought for language which would meet any conceivable case of the employment of money in this state for business purposes, by the class subject to taxation specified in the act of 1855. Those terms embrace the capital of the companies or persons doing business here, and something besides. Now the sole inducement which the

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

relators had for the purchase of the stock deposited by them with the comptroller, was to obtain the right to transact business in this state. That right depended upon the investment. Without the investment, the relators could do no business in this state; and having made it, and deposited the stocks with the comptroller, and performed the other acts prescribed by the act of 1853, their right to transact business here became complete.

Sixth—The recent decision of this court, in the case of *The People agt. The New England Insurance Company*, does not affect this case.

(a) The act of 1851, chapter 95, which rendered it obligatory upon the insurance companies of the other states doing business in this state, to make a deposit of stocks with the comptroller, had been repealed by the act of June, 24, 1853, under which foreign companies were still obliged to make such a deposit. And at the time that the assessment was made in that case, it was not a condition precedent to the rights of the New England company to do business here through its agents, that it should continue its deposit with the comptroller.

In point of fact then, the stock which the New England insurance company had in the hands of the comptroller of this state, was a voluntary deposit, and in no way connected with the transaction of its business here. The remarks of MARVIN, J., in relation to the effect of a deposit of stocks by a life insurance company of another state, under the act of 1851, before that act was repealed, were unnecessary for the decision of the case before the court and *obiter*.

Seventh—The act of April 15, 1857, cited by the relator's counsel in his points presented to the commissioners, does not affect this case, because it expressly exempts from its operation the real estate and stocks owned by life insurance companies. (*Laws 1857, p. 2, § 4; case, p. 13.*) Indeed, the inference is irresistible, from the phraseology of that

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

act, that the legislature supposed that life insurance companies were taxable upon the stocks deposited with the comptroller.

Eighth—The decision of the supreme court of the United States, in the case of *The People ex rel. The Bank of Commerce* agt. *The Commissioners of Taxes and Assessments*, being adverse to the power of the taxing officers of the state to tax United States stocks, the appeal taken by the commissioners will not be discussed.

Ninth—The judgment below should be approved, with costs.

INGRAHAM, J. The decision of this court below as to the United States stocks must be considered as correct under the reviewed decision of the supreme court of the United States on the same question. The stock of the United States is exempt from state taxation, and here the assessment is directly made upon such securities. The respondent's counsel concedes this and does not argue this branch of the case. It is objected on the part of the appellant that the place of assessment should be where the comptroller resides, upon the ground that he holds the funds as trustee, and he, not the company should be assessed. The property, is the property of the company held by them but deposited with the comptroller as security. It would not be taxable if the company did not carry on business in this state. By the provisions of the R. S. vol. 1 (5th ed.) p. 905, § 1, all lands and all personal estate within this state, whether owned by individuals or by corporations, are made liable to taxation, and by section 4, debts due on bonds are included under the term personal estate.

By 1 R. S. (5th ed.) p. 908, § 5, every person is to be assessed in the town or ward where he resides, for the personal estate owned by him, and by section 6, the personal estate of every incorporated company liable to taxation on

British Commercial Life Ins. Co. agt. The Commissioners of Taxes of New York.

its capital shall be assessed in the town or ward where the principal office or place for transacting the financial business is located, or where the operations of the company shall be carried on. The return states that the place of business of the corporation is in the city of New York, which is admitted by the demurrer. The act of 1855, section 1, provides that all persons and associations doing business in this state and not resident of the state shall be assessed and taxed on all sums invested in any manner in said business, the same as if they were residents of the state. Taking these provisions together, I think there can be no difficulty in holding that the place of assessment is the place where the operations of the corporation are carried on.

Generally, under "persons" as used in the laws providing for taxation, corporations have been included, unless some special provision of law provided in the same case for the taxation of corporations under some other form of assessment (*The People agt. Utica Insurance Company*, 15 John. 258); and so corporations have been considered as inhabitants for the purpose of taxation (*Ontario Bank agt. Bunnell*, 10 Wend. 186). These cases show that corporations are to be included under the general term "persons" in regard to their liability to taxation in the place where they carry on their business, and that there is no ground for the objection that the corporation was assessed in the city of New York. The other question is whether the plaintiffs are liable to be taxed upon the bonds of the city of Buffalo deposited with the comptroller. There can be no doubt but that those bonds are included under the term personal estate as used in the statute, and the only question which can arise is whether it is property invested in any manner in the business which they carry on. Upon this point there can be but little doubt. The statute prohibits foreign corporations from carrying on business of life insurance until such company have deposited with the

Williams agt. Barnaman.

comptroller securities to the amount of \$100,000, for the benefit of the policy-holders of the company (*Laws of 1853, ch. 463, § 15*). This deposit with the comptroller is necessarily made in connection with the business of the company, without it they can do no business, and it is so deposited as to be security to those who may hold policies of the company. It is therefore used in the business of the company and in fact forms its capital in this state, which is liable to its creditors and comes within the definition of capital as defined in *The Mutual Insurance Company agt. Supervisors of Erie* (4 Comstock, 448). These securities, so deposited with the comptroller, form the same kind of capital as that of a domestic corporation incorporated for a similar purpose, in which the capital is the security for those who deal with it, neither is actually invested in business and used for that purpose, but both form the basis on which the business is transacted and the security from which payments of claims is to be enforced. So far as the assessment was made on the bonds of the city of Buffalo the same was properly made, and the order appealed from should be affirmed.

SUPREME COURT.

JAMES WILLIAMS agt. MARTIN BARNAMAN.

Before a justice of the peace is authorised to proceed with the action in which an attachment has been issued, it is necessary that he should have the officer's return to the attachment, showing a service of it in the manner provided for by the statute. It is the only manner in which the justice can acquire jurisdiction. The return of the officer is the evidence to be furnished to the justice that the statute has been complied with.

Where the defendant has had no personal notice of the suit, by the service of the attachment upon him, it is vitally important that the different steps prescribed by the statute should be accurately followed.

Where the return of the constable stated "that a copy of the attachment was left with Barnaman's (defendant's) wife, at Martinsville, as defendant cannot be

Williams agt. Barnaman.

found in this county," without an inventory, or any statement that the property had been seized under it: *Held*, that the return was so *fatally defective*, as not to afford any protection to the plaintiff in the sale he afterwards made of the property under an execution upon the judgment recovered in that suit.

The rule is well settled, that where a statute prescribes a new mode of proceeding, either unknown to the common law, or contrary thereto, the statute, so far at least as those parts of it essential to jurisdiction are concerned, must be not only proved, but shown to have been strictly pursued, or the proceeding will be held a *nullity*. The same rule applies to courts of limited and special jurisdiction, as justices' courts. Nothing is presumed in their favor so far as it respects jurisdiction; and the party seeking to avail himself of their judgments must show affirmatively that they had jurisdiction.

Erie Special Term, July, 1864.

MOTION for a new trial on a case containing exceptions, The facts sufficient to present the questions determined, appear in the opinion.

GEO. W. COTHRAN, *for plaintiff.*

I. The affidavit upon which the attachment was issued is *fatally defective*. It does not show that the demand claimed rose upon contract. This fact should appear in it affirmatively. (3 *R. S.* 462, §§ 214, 215, 216, 5th ed.; *Waters agt. Whitmore*, 13 *Barb. S. C. R.* 634; *Cowen's Treatise, by Tracy*, § 834; 14 *Barb. S. C. R.* 96.)

An attachment can issue from a justice's court against the property of non-residents of the county for demands arising on contract only.

In this case the affidavit states that the claim is founded "on a demand arising upon keeping their horses." This statement does not show that the demand rose upon contract, nor does it prove the existence of a contract between the affiant and the parties proceeded against, relative to the keeping of the horses. It does not show any consent or request of the defendants that the affiant should keep their horses, nor any price, time, place or circumstance of the keeping. No privity of contract is shown by it, nor anything from which a contract could fairly be presumed, and it is just as fair to presume that they were wrongfully

Williams agt. Bernaman.

kept as rightfully. But this is a statutory proceeding, and no mere presumptions can be indulged. The affidavit must, conform to the requirements of the statute, state in express terms that the demand arose on contract; or it must contain such an explicit statement of facts, as that the court can readily see that it grew out of contract. (*Cook agt. Farren*, 34 Barb. S. C. R. 95; *Adkins agt. Brewer*, 3 Cow. R. 206.) It does not state that the demand is not for the recovery of money collected by a public officer, &c., as required by statute. (3 R. S. 462, § 212, 5th ed; *Waters agt. Whitmore*, 13 Barb. S. C. R. 634.) The statement at the end of the affidavit "that no warrant can issue in this case," is a mere conclusion of law.

II. The bond taken by the justice on the issuance of the attachment, was void for the want of sufficient sureties. The statute provides that "before any attachment shall issue, &c.," the "plaintiff, or some one in his behalf, shall execute a bond in the penalty of at least one hundred dollars, with such sureties and upon such conditions as is required by section 29, art. 2, tit. 4, chap. 3, part 3, R. S." (*Session Laws 1842, ch. 107*; *Id.* 3 R. S. 463, § 217, 5th ed.) Section 29 states the conditions of the bond, and that the sufficiency of the sureties shall be approved by the justice, &c.

In this case there is no surety in the bond at all, and the justice's docket shows that the bond taken was the bond of the affiant. Even if the court should conclude that C. S. Hawley, whose name is signed to the bond, is a surety and not a subscribing witness, I contend that the statute requires at least two sureties. The act of 1842, amendatory of the non-imprisonment act, requires a bond "with sureties," while the Revised Statutes require but one. This is a proceeding under the act of 1842. (*Davis agt. Marshall*, 14 Barb. S. C. R. 96; *Homan agt. Brinkerhoff*, 1 Denio, 184; *Robinson agt. West*, 11 Barb. S. C. R. 309.)

III. The constable's return of service indorsed on the

Williams agt. Barnaman.

attachment, is insufficient to confer jurisdiction on the justice. By section 29, chap. 2, art. 2, title 4, part 3, of the Revised Statutes (43), it is provided that "the constable to whom such attachment shall be directed and delivered, shall execute the same at least six days before the return day," and shall seize sufficient property to satisfy the demand; and "he shall immediately make an inventory of the property seized, and shall leave a copy of the attachment and of the inventory, certified by him, at the last place of residence of the defendant; but if the defendant have no place of residence in the county where the goods and chattels are attached, such copy and inventory shall be left with the persons in whose possession the said goods and chattels shall be found." Under the non-imprisonment act, the attachment is required to be "served at least two days before the time of appearance therein mentioned" (3 R. S. 462, § 215). And by section 36 of said act, it is provided that "every attachment issued by virtue of this act," shall be served in the same manner as attachments issued under the second article above quoted from, "except that if the defendant can be found in the county, the copy of such attachment and inventory shall be served upon him personally, instead of leaving the same at the place now prescribed in said article; and the return of said officer in addition to what is now required, shall state specifically whether such copy was or was not personally served upon the defendant."

It does not appear by the return to the attachment, that a copy thereof, and of the inventory of the property attached, were either personally served on the defendant, or were left with the person in whose possession the goods were found. (*Cook agt. McDoel*, 3 Denio, 317; *same case affirmed*, 2 N. Y. R. 120; 21 How. Pr. R. 429; *Marshall agt. Canty*, 14 Abb. Pr. R. 237.) The return states the manner of service to have been, that a copy was left with "Barnaman's wife at Martinsville, as defendant cannot be

Williams agt. Barnaman.

found in this county." The return does not show that the attachment was served at least two days prior to the return day thereof. (3 R. S. 431, § 29; 3 R. S. 463, § 218.) It should show affirmatively when the attachment was served (*Stewart agt. Smith*, 17 *Wend. R.* 518). Where the constable's return does not show sufficient facts to authorize the issuing of a summons, the justice acquires no jurisdiction, and all his subsequent proceedings will be void. (*Allen agt. Stone*, 9 *Barb. S. C. R.* 60; *Waters agt. Whittimore*, 22 *Barb. S. C. R.* 593.) The justice acquired no jurisdiction in this case, and the sale of the property under the execution issued on the judgment recovered therein—the defendant not having appeared—constitutes no defence in this action.

IV. The question of jurisdiction can be raised at any time, in any stage of the proceedings, and in a collateral action or proceeding. (26 *How. Pr. R.* 90; *Homan agt. Brinkerhoff*, 1 *Denio*, 184; *Davis agt. Marshall*, 14 *Barb. S. C. R.* 96; *Decker agt. Bryant*, 7 *Barb. S. C. R.* 183; *Van Alstine agt. Erwine*, 1 *Kern. R.* 331; 8 *N. Y. R.* 254; 12 *N. Y. R.* 156).

L. L. LEWIS, *for defendant.*

DANIELS, J. This action was brought to recover the value of certain personal property claimed to be owned by the plaintiff, and wrongfully converted by the defendant. A verdict was recovered by the defendant, which the plaintiff now moves to set aside, and for a new trial.

The only questions arising upon the application, depend upon the validity of proceedings taken in an attachment suit instituted by the defendant against the plaintiff and another, before a justice of the peace in Niagara county, of which the defendants in that action were non-residents. The attachment was issued on the second, returnable on the fifth of June, 1862;—and in his return upon it, the

Williams agt. Barnaman.

constable wholly omits to state the time when the seizure of the property was made under it. The attachment was not served personally on either of the persons named in it as defendants. But the return states that a copy of it was left with "Barnaman's wife, at Martinsville, as defendants cannot be found in this county." There is no statement whatever contained in the return from which it can be even inferred that she was the person having possession of the property attached when the seizure of it was made, or that any inventory or statement of the property attached was left with the copy of the attachment.

Before the justice was authorized to proceed with the action, it was necessary that he should have the officer's return to the attachment showing a service of it in the manner provided for by the statute; and as the defendants had no personal notice of the suit by the service of the process upon them, it was vitally important that the different steps prescribed should be accurately followed. For it was the only manner in which the justice could acquire jurisdiction. The return of the officer is the evidence to be furnished to the justice that the statute has been complied with (3 R. S. 5th ed. 432, § 33). In cases where the process is not personally served, the provision is an important one which requires that a copy of the attachment, with an inventory of the property seized, shall be left with the person in whose possession the goods and chattels shall be found (3 R. S. 5th ed. 431, § 28). For the inference is a natural one that the owner will leave his property in the hands of one who is charged with the duty of protecting his interest in it. (*The Mary*, 9 Cranch, 144; 3 *Curtis' Decisions*, 296.) Leaving a copy of the attachment with Barnaman's wife, without an inventory or any statement that the property had been seized under it, would be no notice to her or any one else, that this property was to be affected by the proceedings, or that any steps were

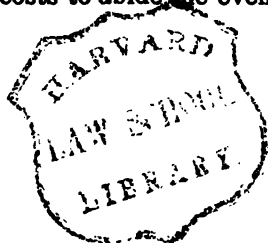
Williams agt. Barnaman.

necessary for the protection of the owner's interest in it, even if it were actually in her possession.

On these defects, without noticing others in the proceedings, they must be held to be so fatally defective as not to afford any protection to the defendant in the sale he afterwards made of the property under an execution upon the judgment recovered in that suit. There was no appearance or waiver of any kind of these omissions to conform to the statute.

The rule is well settled, that where a statute prescribes a new mode of proceeding, either unknown to the common law, or contrary thereto, the statute, so far at least as those parts of it essential to jurisdiction are concerned, must be not only proved, but shown to have been strictly pursued, or the proceeding will be held a nullity. The same rule applies to courts of limited and special jurisdiction, as justices' courts. Nothing is presumed in their favor, so far as it respects jurisdiction, and the party seeking to avail himself of their judgments must show that they had jurisdiction affirmatively. (*Mills agt. Martin*, 19 J. R. 33; *Cowen's Treatise*, 2d ed. 405), where the same principle is affirmed in these words: "A justice is limited by statute to a certain course of proceedings, and unless those proceedings are adhered to, or waived by the party who has a right to insist on them, the judgment is irregular and void. (*Id.* 400, 403; *Cowen & Hill's Notes to Philip's on Evidence*, part 1, 468; part 2, 206.)

The proceeding relied upon by the defence cannot be sustained without disregarding the principles so fully declared and sustained in these authorities. The verdict rendered in favor of the defendant must therefore be set aside, and a new trial granted, with costs to abide the event of the action.



 Rawls agt. Deshler.

BUFFALO SUPERIOR COURT.

HENRY RAWLS AND OTHERS agt. JOHN G. DESHLER.

A sale of *chattels* may be conditional either as to the right of property in them, or as to the possession of them.

When the right of property passes to the vendee, but not the *right to the possession*, the possession may be delivered conditionally, so that the vendor can upon the breach of the condition, recover the possession of the chattels, except as against a *bona fide* purchaser from the vendee.

When the right of property is not to vest in him to whom the chattels are delivered, until the price is paid, the owner can reclaim them from a *bona fide* purchaser of them from him to whom the possession of them was delivered, upon breach of the condition.

D. had a quantity of corn in store in H.'s elevator at B. G. on Tuesday asked D. the price of the corn. D. said 57 cents a bushel. G. asked when he must have the money. D. said, right along. G. said, he would get the corn out by Thursday, and if he did not get it out before, he would pay for it then any way. D. said that would do, and gave G. an order on the elevator to "deliver to G. or order, 4,238 bushels white corn, cargo Potomac, subject to my order until paid for." G. on the same day presented D.'s order to the elevator, and had the corn shipped on canal boat for N. Y. R. made advances in good faith upon the bill of lading of the corn. Afterwards, and on Thursday, G. failing to pay for the corn, D. pursued the canal boat and recovered the possession of the corn:

Held, that the title to the corn passed to G.; that the risk of accident to it was upon G.:

Held also, that R. had to the extent of his advances, a superior right to D. in the corn.

In such cases, in order to confer upon a *bona fide* purchaser rights superior to the vendor, there must be an actual or constructive delivery of the chattel to him. The symbolical delivery of bills of lading and other similar instruments, is a sufficient delivery of the chattel when an actual delivery is impossible (*Steelyards agt. Singer*, 2 *Hilton*, 96, *questioned*).

March General Term, 1862.

Before VERPLANCE, MASTEN and CLINTON, *Justices*.

THIS cause was tried before Justice MASTEN and a jury. Upon the trial, a verdict was directed for the plaintiffs. The defendant excepted. The exceptions were ordered to be heard at the general term in the first instance. The general term ordered judgment upon the verdict. The facts sufficiently appear in the following opinion of the general term:

Rawles agt. Deshler.

H. C. DAY, *for plaintiffs.*

GANSON & SMITH, *for defendant.*

MASTEN, J. This is an action for the conversion by defendant of 4,238 47-56 bushels of white corn. The case comes before us upon exceptions. The court directed a verdict for the plaintiffs, to which direction the defendant excepted.

The corn in question belonged to the defendant, and was in store on his account in the Hatch elevator in this city. The defendant also had some mixed corn in store in the same elevator. On Tuesday morning, the 18th day of September, 1860, Griffin called at his office and asked the price of the corn; defendant said, "fifty-seven cents for the white corn, and fifty-six for the mixed." Griffin went away and in a short time returned and inquired of defendant, when he must have his money, if he took the corn? Defendant replied, "right along." Griffin said, "boats are scarce, and I may not be able to get it out for a day or two." Defendant said, "that would not do, he wanted it more specific." Griffin said, "he would get it out by Thursday, and if he did not get it out before, he would pay for it then any way." Defendant said, "that would do." The defendant thereupon gave Griffin the following order for the corn in question:

"BUFFALO, Sept. 18, 1860.

"HATCH ELEVATOR:

"Deliver to A. L. Griffin, Esq., or order, 4,238 47-56 bush. white corn, cargo Potomac, subject to my order until paid for.

JOHN G. DESHLER."

The defendant at the same time gave to Griffin a like order for the mixed corn. Griffin on the same day (September 18th), indorsed and delivered the above order for the white corn to one Van Buren, a freight broker, with directions to ship the corn to New York. Van Buren on the same day presented the said order for the white corn

Rawles agt. Deshler.

to the Hatch elevator, and had the corn loaded upon the canal boat L. B. Trowbridge, of which one Wendt was the owner and captain, and which plied between the cities of Buffalo and Albany. Van Buren and Wendt signed a bill of lading of the corn, by which the corn was to be delivered at Troy. The bill of lading expressed that the corn was shipped by Van Buren as agent and forwarder, and it was delivered care Silliman, Matthews & Co., Troy, N. Y., canal freight to Troy, $11\frac{1}{2}$ cents per bushel. The canal boat left Buffalo with the corn on the said 18th day of September.

Silliman, Matthews & Co., were the agents of Van Buren at Troy. On the next day (September 19th), Van Buren delivered to Griffin the following paper, in respect to the corn in question :

“ BUFFALO, Sept. 19, 1860.

“ Shipped in good order by A. L. Griffin, on board of canal boat L. B. Trowbridge, B. T. Co. Line, —, master, the following articles to be delivered in like good order as addressed :

“ Acc't A. L. Griffin, 4,238 47-56 bushels white corn, care Rawls & Seymour, New York. Freight to New York $14\frac{1}{2}$ cents per bushel, consignees pay towing.

“ JAMES VAN BUREN.”

On the said 19th day of September, Griffin made his draft upon Rawls & Seymour, the plaintiffs, payable to his own order, at twenty days, for \$2,120. He wrote his name upon the back of said draft, and also upon the back of said bill of lading signed by Van Buren, attached them together, and delivered them to White's bank at Buffalo. The bank discounted the draft upon the strength of the bill of lading, and paid over the proceeds to Griffin, who applied them to his own use. Griffin on the same day (September 19th), advised the plaintiffs by letter of the shipment of the corn and of the draft.

The plaintiffs are commission merchants at the city of New York. They received the letter of advice on the 20th

Rawles agt. Deshler.

of September. On the 21st of September, before eleven o'clock in the morning, they accepted the draft and detached the bill of lading from the draft and retained it. They had no funds of Griffin's in their hands, and accepted the draft upon the strength of the corn, and in good faith. They paid the draft at its maturity. On Thursday, Griffin failed to make payment for the corn, and the defendant, learning that it had been shipped on the Trowbridge, went in pursuit of her, and on the afternoon of the 21st day of September, overtook her a few miles east of Rochester, and replevied the corn. The action was against Wendt, the captain of the canal boat, and judgment was obtained therein by default.

The first question to be considered in the natural order is, what was the legal effect of the transaction between the defendant and Griffin, in respect to the corn in question? Did the title or right of property in the corn pass to Griffin? Was the sale conditional? and if so, was it in respect to the property in or the possession of the corn? or was a lien only reserved for the price? If the title or property in the corn did not pass to Griffin, as between him and the defendant, but only the possession, then we are of the opinion that the title of the plaintiffs is defective, and that of the defendant must prevail.

"The universal and fundamental principle of our law of personal property is that no man can be divested of his property without his own consent, and, consequently, that even the honest purchaser under a defective title cannot hold against the true proprietor." VERPLANCK, *Senator*, in *Saltus agt. Everett* (20 Wend. 275).

In *Covill agt. Hill* (4 Denio R. 323), Justice BRONSON says: "It is a principle of the common law, which has but few exceptions, that a man cannot be divested of his property without his consent; and although possession is one of the most usual evidences of title to personal chattels, yet, as a general rule, mere possession will not enable a man

Rawles agt. Dasher.

to transfer a better title than he has himself, or than he has been authorized by the owner to grant; exceptions in favor of trade are allowed in the case of money and negotiable instruments. But as to other personal chattels, the mere possession, by whatever means it may have been acquired, if there be no other evidences of property or authority to sell from the true owner, will not enable the possessor to give a good title."

Nemo plus juris ad alium transferre potest quam ipse habet, is the axiom of the common law, and it has resisted the innumerable efforts that upon some specious plea or other have been made to break in upon it.

In *Miller agt. Race* (1 Burr. 452), money and negotiable instruments were excepted from the operation of the above maxim, on the ground of the necessities of currency and trade, "by reason of the course of trade which creates a property in the holder."

In *Saltus agt. Everett*, Senator VERPLANCK says: "That after a careful examination of the English cases and those of this state, he comes to the general conclusion that the title of property in things movable, except money and negotiable instruments, can pass from the owner only by his own consent and voluntary act, or by operation of law, and that the honest purchaser, who buys for a valuable consideration in the course of trade, will be protected in his title against the true owner in those cases, and those only, where such owner has, by his own direct and voluntary act, conferred upon the person from whom the *bona fide* vendee derives title, the apparent right of property as owner, or of disposal as an agent, of which there are two distinct classes, and no more. The first is where the owner, with the intention of sale, has in any way parted with the actual property of his goods with his own consent, though under such circumstances of fraud or error as would make that consent revocable, rescind the sale, and authorize the recovery of the goods as against such vendee. But if the

Rawles agt. Deahler.

property passes into the hands of honest purchasers, the first owner must bear the loss. The other class of cases is where the owner 'has given the external *indicia* of the right of disposing of his property,' or by exhibiting to the world a third person as having power to sell or dispose of them."

I do not think that the two classes of cases mentioned by the learned senator can be strictly considered as exceptions to the universal and fundamental principles of law, that no man can be divested of his property without his own consent or act, or by operation of law, nor does the learned senator so consider them.

In the case of *Ash agt. Putnam* (1 *Hill*, 302), however, Justice COWEN seems to consider the first class as an exception to the general rule above stated. The only exception which I find to be established to this fundamental principle is in respect to money and negotiable instruments.

When the owner is induced by fraud or false representations to part with his goods, he may reclaim them. This does not proceed on the ground that the property in the goods does not pass by the sale, but that the dishonest purchaser shall not hold them against the deceived vendor. The vendor may rescind the sale or not at his election, but in the exercise of this election he is governed by legal rules. He must exercise it within a reasonable time. He must make restitution of what he has received from his vendee, and he cannot exercise it to the prejudice of an honest and fair purchaser for value, from the fraudulent vendee. The same rule in reference to a *bona fide* purchaser obtains also in respect to real estate. And I am not able, upon principle or reason, to see any difference whether the fraud or representations by which the chattels were obtained amount to a felony or not, so long as the vendor intended to part with the property in them, and the vendee was bound by the sale. A sale of chattels may be conditional, either as to the right of property in them or as to the possession.

Rawles agt. Deahler.

By the civil law, delivery upon the sale of a chattel is essential to transfer the right of property and perfect the title, even as between the vendor and vendee. But by the common law, the contract of sale of personal property without delivery or the payment of the price, transfers, as between the parties, the right of property in the thing (*Olyphant agt. Baker*, 5 Denio R. 379).

Chancellor KENT, in his *Commentaries*, says: "When the terms of the sale are agreed on and the bargain is struck, and everything the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties without actual payment or delivery, and the property and risk of accident to the goods vests in the buyer. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery or the time of payment. For though the vendee acquires a right of property by the contract of sale, he does not acquire a right of possession of the goods until he pays or tenders the price" (2d volume, 492).

When the right of property passes to the vendee, but not the right of possession, the possession may be delivered conditionally, so that the vendor can as against the vendee, rescind the sale or enforce his lien if the price is not paid according to the condition. But he cannot in such case do so to the prejudice of a *bona fide* purchaser for value from his vendee. (*Haggerty agt. Palmer*, 6 John. Ch. R. 437; *Buck agt. Grismhow*, 1 Edward's Ch. R. 140; *Smith agt. Lynes*, 1 Selden's R. 41.)

It is also well settled that a sale and delivery of chattels on condition that the right of property in them is not to vest in the vendee until the purchase money is paid or secured, does not pass the right of property to the vendee until the condition is performed. (*Herring agt. Hoppock*, 15 N. Y. R. 409; *Herring agt. Willard*, 2 Sand. 418; *Strong agt. Taylor*, 2 Hill, 326; *Patton agt. McCane*, 15 B. Monroe,

Rawles agt. Deahler.

[Ky.] 555; *Coggill* agt. *Hartford & New Haven R. R.* 3 *Gray*, 545; *Copeland* agt. *Bosquet*, 4 *Washington C. C. R.* 588.)

In such case, when the contract is entered into in good faith, and for the sole purpose apparent on its face, and without any design to give the vendee by the possession of the property a false credit, or to enable him to impose upon innocent persons, it is impossible by a sound course of reasoning to establish the proposition that a *bona fide* purchaser from such possessor can obtain a superior title to that of the true owner.

The possession is under a contract *for* sale and not *of* sale. The possessor has no title, and only a bare right of possession. He is the bailee of the vendor. The mere possession, as we have already seen, does not carry with it an authority to sell. The contract confers no such authority, and furnishes no false evidence of title, for his rights appear upon its face. It is difficult to see how, upon the well established principles of law, he can convey to any one more than he had.

The distinction between a conditional sale, as it respects the right of property, and a sale conditional only as to the possession, or a sale induced by fraud, is, that in the former there is bare possession without any right of property, in the latter two there is a right of property and also the possession. This question has been decided according to the views I have expressed, in the following cases: (*Patton* agt. *McCane*, 15 *B. Monroe R.* 555; *Coggill* agt. *Hartford & New Haven R. R. Co.* 3 *Gray*, 545; *Sargent* agt. *Metcalfe*, 5 *Gray R.* 306; *Deshon* agt. *Bigelow*, 8 *Gray R.* 159; see also *Copeland* agt. *Bosquet*, 4 *Washington C. C. R.* 588; *Herring* agt. *Willard*, 2 *Sand. R.* 418.)

In *Steelyards* agt. *Singer* (2 *Hilton*, 96), it was held as matter of law, that a *bona fide* purchaser from a vendee who had but the bare possession under a contract in which no title was to vest in him until the purchase money was paid,

Rawles agt. Doshler.

obtained a superior title to the true proprietor. The case does not appear to have been well considered. The cases cited are all cases in which the person from whom the *bona fide* purchaser derived title, had the right of property as well as the possession of the goods. The learned judge who delivered the opinion in *Steelyards agt. Singer*, did not seem to establish the exception which he made in that case to the general and well established principle that no man can be deprived of his property, except by his own consent or voluntary act, and that no one can transfer to another a better title than he has himself, upon the exigencies of trade or currency, but upon the ground that the article in question (a sewing machine) has become an ordinary household chattel. We do not approve of the reasoning, nor of the exception. Exceptions to general rules or principles, should never be sanctioned, except upon the most cogent necessity and reason; they should be supported by general considerations, and not merely upon individual cases of hardship. They multiply uncertainties and increase litigation. Efforts have been made by counsel to establish exceptions to the general principle of law in respect to the transfer of property in chattels, in favor of the honest purchaser for a valuable consideration, from him to whom the true owner had entrusted the mere possession of his goods on the ground of the exigencies of trade, and on the further ground that when one of two innocent persons must suffer, the loss should fall upon him who has entrusted the possession of his goods to a third person, and thus furnished him with the appearance of ownership, than upon an innocent purchaser from such third person, who had purchased and parted with his money upon the faith of such appearances.

But the courts of England and of this state have decided again and again that no such exceptions, with the single one of money and negotiable instruments, exist. Where the owner has been guilty of negligence, or done any act

Rawles agt. Deahler.

beyond that of simply entrusting the possession of his goods to another, by which such person has been aided in perpetrating the fraud upon the innocent purchaser, the title of the latter will prevail over that of the true owner. I believe that the rules of law, as they are established, furnish a better security of the rights of property, and are less productive of frauds than they would be if the exceptions of which I am speaking were engrafted upon them. The carelessness and irregularities which even now oftentimes characterize mercantile transactions, would greatly increase, and the maxim "be careful purchaser," would no longer exist.

The value of personal chattels would be greatly depreciated if the right to entrust their possession to others did not exist as an element of proprietorship. The necessities and exigencies of commerce, about which so much is said, require that agents, bailees and others, should be entrusted with the possession of chattels, and if the principles of law, to which I have alluded, should be broken in upon, it would not only open wide the doors of fraud, and place the owner at the mercy of every one who should have the possession of his goods, but would also under the temptation of a good bargain, lead the purchaser to disregard the wholesome caution inculcated by the maxim *caveat emptor*, and which, if felt, would probably have led to the discovery of the truth.

But it is not necessary to speculate as to consequences. It is the duty of the court to declare the law as it finds it, and not to legislate. We are of the opinion that by the contract of sale between the defendant and Griffin, and the delivery of the corn upon the order of the defendant, the property in the corn passed from the defendant to Griffin, and that the defendant delivered the possession of it conditionally, or reserved a lien upon it for the purchase price. It was contended on the part of the defendant, that the words "subject to my order until paid for," upon the face

Rawles agt. Doshier.

of the delivery order, mean that the right of property was not to pass until the price of the corn was paid, and are equivalent to, "the title to the corn is not to pass until paid for." But we think not. The corn after the delivery was at the risk of Griffin. If it had been injured or destroyed before Thursday by any casualty, the loss would have fallen upon Griffin. The bargain was struck, the statute of frauds was satisfied, and the property in the corn vested in Griffin, subject to the "order," i. e., control, direction, lien of defendant until paid for.

We therefore are of the opinion that Griffin had the right of property in the corn as well as the possession of it, and could transfer as against the defendant, the right of property in the corn by a perfect title to a purchaser in good faith and for a valuable consideration, in the usual course of trade. The plaintiffs in good faith made advances to Griffin upon the strength of the corn, by accepting his draft upon them. We are of the opinion that a sufficient transfer and delivery of the corn was made to the plaintiffs before the defendant retook it.

The defendant had done nothing to induce the plaintiffs to accept the draft of Griffin, and as I understand the law, an actual or constructive delivery of the corn to the plaintiffs was necessary to confer upon them superior rights in the corn to the defendant. When an actual delivery is impossible, it may be made symbolically, or constructively, as of goods on ships at sea, by an indorsement of the bill of lading. It is now well settled that bills of lading and other documents of a similar nature, have not the character of negotiability, and that the indorsement and transfer of them are merely evidence of sale, and as a symbolical delivery "operates no farther than a direct delivery of the goods would have done" (*Note by American editors to Lickbarrow agt. Mason*, 1 *Smith's Leading Cases*, 890).

The instrument which Van Buren gave to Griffin was not strictly speaking a bill of lading. Van Buren had no inter-

Rawies agt. Deakler.

est in the canal boat, he had not even chartered it. He loaded the corn upon the boat and took a regular bill of lading, signed by the captain, for the delivery of the corn to Silliman, Matthews & Co., at Troy, for himself. This he probably did to perform his undertaking with Griffin to forward or carry the corn to New York. The instrument Van Buren gave to Griffin is in the form of a bill of lading, but is not signed by the owner or master of the boat. It was the acknowledgment given by Van Buren of his receipt of the corn from Griffin, to be transported to the city of New York, and there to be delivered to Griffin, and of the measure of his compensation. It was the only document Griffin received. It was indorsed and delivered by Griffin to White's bank as a symbol of the corn, while it was in transit, and by the bank to the plaintiffs. We are of the opinion that this instrument is such a symbol, the delivery of which, under the circumstances, was equivalent to an actual delivery of the corn, and that there was a sufficient delivery of the corn to the bank and to the plaintiffs. (*Gibson agt. Stevens*, 8 *How. U. S. R.* 384; *Bank of Rochester agt. Jones*, 4 *Comstock*, 497.)

The court upon the trial was asked to decide that the recovery in the action between the defendant as plaintiff and Wendt as defendant, was a bar to this action. The court refused, and the defendant excepted.

This precise question was decided in the supreme court in this district at general term, in May, 1856, in the suit of *Kimberly agt. Patchin*, according to the ruling at the special term. We feel ourselves bound by that decision, and refer to the elaborate opinion of Justice GREENE delivered on that occasion. The court also properly refused "to decide the taking and retaining of the corn by the defendant under the papers in the action brought by him, as aforesaid, did not subject him to this action" (*Shipman agt. Clark*, 4 *Denio*, 446).

Judgment must be entered upon the verdict.

Tucker agt. Whi

SUPREME COURT.

TUCKER agt. WHITE.

Reported in 27th How. 97.

MOTION for a new trial on a case, after unconditional judgment.

This case as above reported, holds that "*as an original question*," it is clear that the *entry of judgment* on a verdict, forms no bar to a motion at special term for a *new trial on a case*, whether it be entered to stand as security or not.

And the authorities holding to the contrary, though regarded as perhaps binding until reversed, are disapproved by the general term in the eighth district in deciding this case—Judge GROVER writing the opinion.

In a note at the foot of the case as reported in *27 Howard*, the reporter adds: "It is proposed in a future number to furnish a critical review of all the reported cases on the question, chronologically arranged, and to show that under the Code as it now stands, the authorities are not in reality in conflict with the doctrine above enunciated, etc.*"

The authorities cited but disapproved in Judge GROVER's opinion as in conflict with the doctrine contended for, are as follows: *Jackson agt. Fassit*, 17 *How.* 453; *Morange agt. Morris*, 20 *How.* 258; *Jackson agt. Fassit*, again, 21 *How.* 280, and *Soverhill agt. Post*, 22 *How.* 386.

The case of *Jackson agt. Fassit*, 17 *How.* 453, was decided at the New York special term, held by Justice ROOSEVELT, in January, 1859; and *Jackson agt. Fassit*, 21 *How.* 280, was the same case on appeal from Judge ROOSEVELT's order to the general term, held by Justices CLERKE, SUTHERLAND and INGRAHAM, in June, 1861. On examination of the case as reported at special term, it appears that the learned judge concedes that the motion may be made after judgment where it is entered as security, and that while he argues that in other cases *only the judge at circuit* can hear such a motion, and *that before judgment*, yet in the case before him he does decide the motion *on the merits* as well as on the question of jurisdiction. It may be added that the opinion does not profess to go fully into the question, or review the authorities or changes in the law, evidently (p. 455) postponing or delegating that duty to the general term, to which it is rather taken for granted an appeal will be brought.

At the general term, while the court express a concurrence with the special term on the question of jurisdiction, yet it is done rather on a cursory view of the point, and without much apparent research, the court proceeding immediately to a full examination and decision of the motion *on the merits*, resting their jurisdiction on

* It is proper to state that this *NOTE*, referred to in *27 How. 97*, was made at the suggestion of F. E. Cornwell, Esq., of Buffalo, counsel for the defendant in the case of *Tucker agt. White*, there reported, with the assurance that he would make good its statements, having had the question under examination in that case. By the present *NOTE*, we think Mr. Cornwell has very fully and ably redeemed his promise. The space given to it could not, in our judgment, be occupied with a more interesting and useful question of practice.—*REP.*

Tucker agt. White.

the proposition that making and serving a case and exceptions, and attaching it to the record is *equivalent* to a notice of appeal from the judgment.

Without disrespect to the learned judges who delivered these opinions, it may well be said that the two cases are hardly insurmountable authority on the point in question, inasmuch as the point was not necessarily involved in the decision, the case being finally put on other grounds.

The next case referred to by Judge GROVER, is *Morange agt. Morris* 20 *How.* 257. That was a motion to dismiss an appeal from a judgment entered on a verdict to general term, upon the ground that by the terms of section 265 of the Code a motion for a new trial on a case or bill of exceptions must be first heard and decided at circuit or special term, and could not, as was sought to be done there, be heard in the first instance at general term, without a direction to that effect by the judge at the trial, which in that case had not been obtained. This was the only point in the case, *i. e.* whether a motion for a new trial on exceptions could be made at the general term in the first instance without a direction to that effect by the circuit judge; and Judge HOXBLOOM shows very clearly that it can be done *on an appeal from the judgment*, by virtue of sections 278, 281 and 348 of the Code, the bill of exceptions being attached to the record. And the learned judge takes occasion to show to *what cases* the prohibition or imperative language of section 265 was meant to apply, and in the course of his examination adopts the theory that it applies *only* to a review of a verdict and trial *before judgment*. It was enough for the purpose of disposing of the case before him, to establish that section 265 did not *prohibit* a motion for a new trial on exceptions *on appeal* from the judgment, the bill of exceptions being attached to the record. The question considered in *Tucker agt. White* was not before him for decision, and the case is therefore not authority on that point; certainly not therefore an insurmountable case when it is shown that as applied to that point his reasoning is unsound, or that he overlooked the old practice and the present rules in respect to motions for new trial on a case after judgment.

In *Soverhill agt. Post*, 22 *How.* 393, the next case referred to by Judge GROVER, it was held that "where a regular judgment has been entered by plaintiff on a verdict in his favor, and judgment roll filed, and subsequently defendant moves to set aside the judgment and verdict for alleged improprieties of the judge and jury before whom the cause was tried, which motion is *denied*, reserving to the defendant the liberty to move for a new trial *on a case* as though such judgment had not been perfected, and subsequently the defendant moves at special term for a new trial on a case, which motion is denied: *held* that the defendant cannot *appeal* to the general term from the *order* denying the latter motion, the judgment in the meantime standing as a final judgment and not appealed from.

This decision was made at Albany general term in March, 1861.

On the preceding page (386) of the same volume (22 *How.*), is the case of *Pumpelly agt. The Village of Owego*, in which the Broome general term in January, 1862, decide the same point *the other way*, the only difference being that in the latter case judgment was entered *after* the order denying new trial, but *before* the appeal from it.

Laying out of view the conflict between the two cases thus cited, it will be seen on looking at the opinion in *Soverhill agt. Post*, that the case was heard and decided *on the merits*; and that on the question of jurisdiction the court only said "it would seem" that the preliminary objection on the point of practice was well taken. It seems clear therefore that Judge GROVER pays quite too much deference to this

Tucker agt. White.

case also as authority, since the court, without examination, simply gives its impressions on a point not necessary to the decision of a case already disposed of against the motion on the merits.

These are all the cases referred to by Judge GROVER as making up the current of opposing authority, no one of them being decided or disposed of on the point in question, and there being in no one of them any attempt by the court to give the point a critical examination.

The counsel for plaintiff in *Tucker agt. White*, cites one other case: *Gurney agt. Smithson*, 7 *Boew*. 400. It must be conceded that in that case, the point was directly involved and passed upon. But the decision is based upon a most erroneous assumption by the court as to what the former practice had been, as will be seen by the language used in the opinion, which is as follows:

"The order refusing such new trial after judgment, was clearly correct. By the practice as it stood before the Code, the rule for judgment was conditional, unless cause should be shown within four days after the verdict; the motion for a new trial was required to be made within that time, unless it was enlarged by an order of the court; if the judgment was once entered, no new trial could be allowed, even on newly discovered evidence, (*Jackson agt. Chace*, 15 *J. R.* 354); and *this principle remained undisturbed until the time of the adoption of the Code*; a judgment once entered could not be overleaped to get at a verdict upon which it was founded. The 264th section of the Code, subdivision one, requires the clerk of the court to enter the judgment in an action upon receiving the verdict, and in conformity therewith, when no different direction is given by the court; no other change is made in the practice; such order of the special term must therefore be affirmed with costs."

Now so far from its being true that "*this principle remained undisturbed until the time of the adoption of the Code*," we have shown in 22 *How*. at page 100, that from 1832 to 1848 at least, a period of 16 years, it was the settled practice of the court to entertain motions for new trial on a case *after judgment*, and to set aside the judgment and grant restitution if collected. That under the Code of 1848, and rules of the court, that practice was not disturbed by any express law or rule. That in 1849 (*Code of 1849*, sec. 265), the four-day rule and stay of proceedings was revived. But that *that* practice lasted only two years, and was abrogated in 1851 in part, and wholly abrogated in 1852. (22 *How*. pp. 104, 105.)

We feel warranted therefore in saying that the court in deciding the case in 7 *Boeworth*, fell into an error in regard to the practice and rules on this subject as formerly established, and in assuming the continuance of the rule in 15 *J. R.* 354, down to the time of the Code. And such erroneous assumption being the avowed basis of their decision, it seems fair to say that *that* decision also is not an insurmountable authority in the way of settling the rule of practice as Judge GROVER admits it should be settled, but for the supposed current of authority the other way.

The foregoing are all the cases relied on by plaintiff in *Tucker agt. White* as authority for the proposition that the motion cannot be made after unconditional judgment entered. The following are also cited in some of the *Digests*, as bearing on the question, and as favoring the doctrine contended for by the counsel for *Tucker*.

Case agt. Shepherd, 1 *Johnson's Cases*, 245; decided in January, 1800. Good authority in its day and under the rules of 1799. Those rules were abrogated by the act of 1832 and the rules of 1833. But even in that case the motion was heard

Tucker agt. White.

notwithstanding the judgment, on the ground that counsel had made the case in good faith, and had misapprehended the rule.

Jackson agt. Chase, 15 Johns. 354; decided in August, 1818; also under the now abrogated rule of 1799. The whole opinion is as follows: "*Per Curiam*. A motion for a new trial must be made within the first four days of the term, and before judgment is perfected, unless an order to stay proceedings on the verdict has been obtained, which operates as an enlargement of the rule of four days. In no case has a motion for a new trial been heard after a judgment has been regularly perfected. The case of *Shepherd* arose soon after the present rules and orders of the court were made; and the court, under the particular circumstances of the case, of an alleged misapprehension of the meaning of the rule of January term, 1799, allowed the motion to be made. *Motion denied.*"

Grant agt. Root, 3 Cow. 354; decided in October, 1824; also under the abrogated rule of 1799. But here also, as the court said there was probable cause for a new trial, and counsel had misapprehended the rule, they allowed the motion to be made notwithstanding the perfected judgment.

These are all the cases we have been able to find from 1799 to 1832. After working under this rule for thirty-three years, but seldom enforcing it, (twice out of three times it was disregarded or relaxed by the court as we have seen,) and finding it worked badly the legislature interfered, and in 1832 passed the act fully set forth in 27 *How. 100*, under which an entirely new practice and new rules on this subject were inaugurated (*Ed. of Rules of 1837, p. 86; Gr. Pr. 2d Ed. p. 637 to 640*) and continued for sixteen years, down to the Code of 1848. In that Code, we see some traces of a disposition to revive the four-day rule, in sections 219 and 220, which are as follows:

"§ 219. Upon receiving a verdict, the court shall direct an entry to be made, specifying the time and the place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment to be rendered thereon, or an order that the case be reserved for argument or further consideration."

"§ 220. Judgment shall be entered by the clerk, in conformity to the verdict, after the expiration of four days, unless the court order the case to be reserved for argument or further consideration."

The next year, 1849, the Code was extensively amended and enlarged, so that these sections, 219 and 220, became sections 264 and 265; but the only changes made in these sections were in 220, by inserting the words "*which shall be final*" between "verdict" and "after," and adding to the section at the end the words, "*or grant a stay of proceedings*;" so that in the Code of 1849, section 219 (264) read as before, and section 220 (265) read as follows:

"§ 265. Judgment shall be entered by the clerk, in conformity to the verdict, *which shall be final after the expiration of four days*, unless the court or a judge thereof order the case to be reserved for argument or further consideration, *or grant a stay of proceedings.*"

As no further change was made until 1851, it will be proper to examine here the decisions made on this point under the Codes of 1848 and 1849, as reported.

Ball agt. The Syracuse and Utica R. R. Co. (6 *How. 198*) was decided at Madison special term in October, 1851, having been tried at December circuit in 1850. The marginal note is this: "A justice of this court, at special term, has power to hear and decide a motion for a new trial, on the ground that the verdict is against evidence. But the case must be reserved under § 264, or the proceedings be stayed under § 265. If the judgment is suffered to become final under the latter section,

Tucker agt. White.

the motion cannot be entertained. The court cite *Droz agt. Lakey & Pine*, 2 *Sandf.* 681, with approbation.

Droz agt. Lakey & Pine, 2 *Sandf.* 681, was decided at special term of New York superior court, January 19, 1850, marginal note as follows: "A party obtaining a verdict, is not bound to wait four days before entering and perfecting his judgment. The four days mentioned in the Code, after which judgment becomes final, are intended to enable the losing party to obtain a stay of proceedings in reference to a case. If he obtain an order staying proceedings within the four days, he may move to set aside the verdict as against evidence, notwithstanding the entry of judgment."

Collins agt. The Albany and Schenectady R. R. Co., 5 *How.* 435, decided by Albany general term in May, 1851, held that, "An appeal will not lie in the first instance to the general term, upon a case containing questions of *fact alone*. Application for a new trial *must* first be made at the special term." The cause had been tried at the Albany circuit in March, 1850; verdict \$11,000. Judgment entered and case attached to record, containing no exceptions, and defendant appealed to general term, complaining that the verdict was against evidence. The court dismissed the appeal, without prejudice to the right of the defendants to apply for a new trial at special term.

These cases are sufficient to show how the courts construed the Codes of 1848 and 1849. The *entry of judgment* did not prevent the motion. Indeed it was the duty of the clerk to enter the judgment *on the verdict*, under the Code of 1849, in all cases. But it did not become *final* until four days had elapsed. A case made within that time, or a stay within that time and case within the stay, was all that was necessary to warrant the making of the motion, notwithstanding judgment was entered.

In 1851 sections 264 and 265 were amended so as to read as follows:

"§ 264. Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment to be rendered thereon, or an order that the cause be reserved for argument or further consideration. The justice trying the cause may, in his discretion, and upon such terms as may be just, stay the entry of judgment and further proceedings, until the hearing and final decision of a motion for a new trial, or to set aside the verdict or judgment, upon the grounds of surprise or irregularity, or upon a case or bill of exceptions."

"The court shall have power to order a verdict to be entered, subject to the opinion of the court thereon. The judge who tries the cause may, in his discretion, entertain a motion to be made on his minutes to set aside a verdict and grant a new trial upon exceptions, or as being against evidence, or for insufficient evidence, or for excessive damages; but such motion in actions hereafter tried, shall only be heard upon the minutes at the same term or circuit at which the trial is had, and if not heard at the same term or circuit in actions hereafter tried, the motion must be made upon a case or bill of exceptions, or upon appeal. When such motion is heard and decided upon the minutes of the judge, an appeal may be taken from such decision, and in case of appeal, a case or bill of exceptions must be prepared and settled in the usual form, and upon which case or bill of exceptions the argument of the appeal must be had."

"After the trial of a cause, either party may, in the manner prescribed by law and the rules of the court in which the action is pending, make and settle a case or

Tucker agt. White.

bill of exceptions, which when settled shall be filed, and when filed after judgment, shall be attached to and become a part of the judgment roll."

"§ 265. Motions for a new trial on a case or bill of exceptions, motions for judgment on a special verdict or case reserved subject to the opinion of the court, shall in the first instance be heard and decided at a special term, unless the justice trying the cause shall direct it to be heard in the first instance at a general term. If such order is granted, directing it to be heard at a general term, such motion may then be noticed and brought on to argument by either party at a general term of such court, and the court shall hear and decide the same."

The most noticeable amendments appear to be—

1. Dropping altogether the provision making judgment final after four days;
2. Expressly authorising "*a motion . . . to set aside the . . . judgment . . . upon a case or bill of exceptions.*" (See first paragraph of sec. 264.)

3. Providing in terms, by paragraph 3 of section 264 for the making and settling of a case or bill of exceptions "*according to law and the rules of the court.*"

4. Providing in terms (sec. 265) that motions for new trial on a case *shall* be first heard at special term unless the judge at the trial send them to general term,

In 1852 the legislature again amended sections 264 and 265, so as read as follows:

"§ 264. Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and the place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon, or an order that the cause be reserved for argument or further consideration. If a different direction be not given by the court, the clerk must enter judgment in conformity with the verdict. If an exception be taken, it may be reduced to writing at the time, or entered in the judge's minutes and afterwards settled as provided by the rules of the court, and then stated in writing in a case, or separately, with so much of the evidence as may be material to the questions to be raised, but need not be sealed or signed, nor need a bill of exceptions be made. If the exceptions be in the first instance stated in a case, and it be afterwards necessary to separate them, the separation may be made under the direction of the court, or a judge thereof. The judge who tries the cause may, in his discretion, entertain a motion to be made on his minutes to set aside a verdict and grant a new trial on exceptions, or for insufficient evidence, or for excessive damages; but such motion in actions hereafter tried, if heard upon the minutes, can only be heard at the same term or circuit at which the trial is had. When such motion is heard, and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had."

"§ 265. A motion for a new trial, on a case or exceptions, or otherwise, and an application for judgment on a special verdict or case reserved for argument or further consideration, must in the first instance be heard and decided at the circuit or special term, except that when exceptions are taken, the judge trying the cause may at the trial direct them to be heard in the first instance at a general term, and the judgment in the mean time suspended; and in that case they must be there heard in the first instance, and judgment there given. And where upon a trial the case presents only questions of law, the judge may direct a verdict subject to the opinion of the court at a general term, and in that case the application for judgment must be made at the general term."

Tucker agt. White.

Mainly a change of phraseology, but making still further changes which seem to denote an unmistakable purpose to return to the practice existing under the law of 1832.

1. They dropped wholly the provision for a *stay of entry of judgment*, and made it *imperative* on the clerk, *at the trial*, to "enter judgment in conformity with the verdict," unless "a different direction be given by the court." (Section 264, sub 1.)

2. Still making it imperative (sec. 265) that a motion for a new trial on a case be first heard at special term, unless the judge should send it to general term direct, but providing that he might do so, *where exceptions were taken*, but in that case (and here comes in an important change) *the judgment is to be in the meantime suspended*; that being no doubt "the different direction" spoken of in section 264.

Nothing, it seems to us, could more clearly indicate the intention to allow a motion for new trial *on a case after judgment*. For judgment *must* be entered at the trial on the verdict, unless the judge order otherwise; and the only *order otherwise* he is enjoined to make is "where exceptions are taken" he is to *suspend judgment*, and send the case to general term in the first instance. That is, where the motion is on the fact, i. e. to set aside verdict as against evidence, the judgment cannot be suspended, and the motion *must* be made at special term.

The rules of the court also admit of no other view of the practice. By rule 34, a case is to be made by the party desiring to move to set aside the verdict, "within ten days after the trial *if by jury*." But of what use would be the case if the motion could not be made after judgment? For the clerk must enter judgment in conformity with the verdict, when the verdict comes in. And if we suppose costs taxed and judgment entered *on notice*, still it is all done in less than ten days, only a five days' notice of taxation being required in any case. And there is no provision limiting the time within which the judgment becomes final, and no provision for stay of proceedings; that is to say, except the making of the case within the ten days prevents the judgment becoming final in the old sense of that term.

As to the cases decided since the amendments of 1852, there are several containing *dicta* that the motion cannot be made after judgment. But it will be found on looking at them that they all cite the old practice under the rule of 1799, and then assume, without examination, that no change in the practice has been made since.

Anthony agt. Smith, (4 *Borw.* 503,) is one of these cases. On this point the court say, "By the settled practice as it existed prior to the Code, a motion for a new trial could not be made on a case, or on the ground of newly discovered evidence or surprise, after judgment had been regularly perfected." Citing the old case of *Jackson agt. Chace*, (15 *J. R.* 354,) already noticed, and *Rapelys agt. Prince*, (4 *Hill*, 125,) and *Roosevelt agt. The Heirs of Fulton*, (7 *Cow.* 107,) the court then refer to the act of 1832, admitting that under it a *bill of exceptions* (and they might have added, a case) could be argued *notwithstanding judgment had been perfected*, and yet fail to apply it. And then the court add: "The practice under the Code is the same as before it was enacted." Which of the two systems of practice before the Code do the court mean? If the most recent, then why does not the practice under the act of 1832 now prevail?

Barnes agt. Roberts (5 *Borw.* 73) is another case to the same point; and the same cases, 15 *J. R.* *et al.* are cited as authority. *Rapelys agt. Prince*, (4 *Hill*, 125,) cited in both, simply holds that a motion for new trial on the ground of *surprise* merely, cannot be made after judgment perfected. *Roosevelt agt. The Heirs*

Tucker agt. White.

of *Fulton*, (7 Cow. 107,) also cited in both, was prior to the act of 1832, to wit: May, 1827. Yet in that case, even under the rule of 1799, the judgment entered was vacated because the successful party, without objecting to the rule, had gone through with the argument of the motion for a new trial, and a new trial had been granted.

On the other hand, some of the cases decided under the Code as amended in 1851 and 1852, hold that the motion may be made notwithstanding judgment perfected.

Mersereau agt. *Powell* (6 How. 294), December, 1851, at Broome special term: Judge SHANKLAND, after noticing the old rule (1799) and referring to 4 Hill, 125, and 15 J. R. 354, says: "But by the Code, judgments may be entered in vacation and are peremptory. If, therefore, a motion for a new trial on the ground of a surprise or newly discovered evidence, comes too late after judgment, the defendant would practically be denied the benefit of such motions in all cases."

Benedict agt. *Caffee*, (3 Duer, 669.) The judgment it is true had been entered in terms as security. The unsuccessful party moved to vacate it, supposing it stood in the way of a motion to set aside the verdict as against evidence. The motion was denied as unnecessary; but the reasoning of the court applies as well to an absolute judgment. Judge SLOSSON says: "The entry of judgment in this case, does not prejudice a motion for a new trial on the ground of the verdict being against evidence (*Rule 8, Superior Court*). The terms of the rule plainly imply that such motion may be made, notwithstanding the entry of judgment, and we find nothing in the provisions of the Code inconsistent with it."

It is to be observed that all the adverse cases agree that the motion may be made where the judgment is entered to stand as security. It might be useful to inquire what authority there is in the Code for any such distinction, as Judge SHANKLAND says, under the Code, "judgments are peremptory." But to proceed with cases upholding the doctrine contended for by us.

Maloney agt. *Dows*, (18 How. 27,) was decided before special term of New York common pleas in August, 1859. The words, "before judgment," in brackets, in the reporter's head note to the case, seem to have been inadvertently used, as we find nothing in the opinion warranting any such limitation. It is true these words are used by the court, but not, we think, in the sense of limitation. Judge DALY shows conclusively, in our judgment, that the practice under the act of 1832, is now in force, modified only by the changes in the names of the courts which are to grant the relief. The judge says:

"The remedy in a case of this kind, before the Code, was by a motion founded upon a case or bill of exceptions to set aside the non-suit, which was in effect a motion for a new trial, which would follow as a matter of course if the motion was granted." *Citing authorities.* It was embraced in the class then known as enumerated motions, which was heard in this court by all of the judges sitting in banc every Saturday, and in the supreme court the motion was heard in the first instance, before the circuit judge, unless he should direct that it be carried immediately before the supreme court." (*Citing laws of 1832, p. 188; laws of 1833, p. 396; Hichee* agt. *Chamberlain*, 12 Wend. 264.) "If the party seeking the review wished to prevent the entry of a judgment, he obtained an order staying proceedings until the motion was heard and disposed of, but the motion might be made, though the judgment had been perfected and execution issued, and if granted, the court would order restitution." (*Citing laws of 1832, chap. 128, § 1, p. 188.*) "If the motion was denied, an appeal lay to the supreme court, from the decision of the circuit judge. The Code (says Judge DALY) has made no material

Tucker agt. White.

change as to the course of procedure, where the object is to obtain a new trial. The application by motion to the special term, in the first instance, except where the judge at the trial directs it to be heard in the first instance at the general term, is analogous to the former motion before the circuit judge, or before the judges of this court or the superior court, and the appeal from the order granting or refusing the new trial is the establishment in the three courts of the practice which, before the Code prevailed only in the supreme court, while the appeal upon the law to the general term from the judgment is a substitute for the former writ of error."

The opinion proceeds in the same line of reasoning at considerable length, and shows conclusively that the former practice is still in force as to motions for a new trial, agreeing in this respect with all the cases on both sides on that point, but meaning by the term, "former practice," not that in vogue under the rule of 1799, but that which immediately preceded the Code, to wit: the practice as established by the act of 1832, and the rules in pursuance thereof.

We have hardly space to pursue the subject further. If the aim and object of this investigation has been accomplished, it has done something towards satisfying the bench and the bar of the correctness of the following propositions:

First. That the cases cited (but disapproved) by Judge GROVER in *Tucker agt. White*, and relied on by plaintiff's counsel, do not make the question in issue *res adjudicata* in the supreme court, since in three of the five cases the motion was actually heard and decided on the merits, in the fourth case (*Morange agt. Morris*) the question was not up at all, the point being as to whether exceptions could be heard in the first instance at general term on appeal from a judgment on a verdict; and in the fifth case, (*Gurney agt. Smithson*), the reasoning of the learned judge and his decision were based upon false premises, and an entire overlooking of the fact that the practice under the act of 1832 prevailed for sixteen years preceding the enactment of the Code.

Second. That the cases not cited by Judge GROVER, but referred to in some of the Digests, as favoring the idea that the motion cannot be made after judgment, do not establish any such doctrine, since of nine cases so referred to, four (*Cass agt. Shepherd*, 1 J. C. 354; *Jackson agt. Chace*, 15 John. 354; *Grant agt. Root*, 3 Cow. 354; and *Roosevelt agt. The Heirs of Fulton*, 7 Cow. 107) were decided under the rule of 1799; one (*Rapelye agt. Prince*, 4 Hill, 125) does not decide the point, but only that for *surprise merely*, the motion is *too late* after judgment; two (*Ball agt. Syracuse and Utica R. R. Co.*, 6 How. 198, and *Droz agt. Lakey and Pine*, 2 Sandf. 681) were decided under the Codes of 1848 and 1849; and the remaining two (*Anthony agt. Smith*, 4 Bosw. 503, and *Barnes agt. Roberts*, 5 Bosw. 73) being the only cases, except *Gurney agt. Smithson*, that directly involve and decide the point *under the Code as it now is*, are not insurmountable authority on the point, because 1. They cite and depend on the old cases under the rule of 1799, ignoring the act of 1832; and 2. They are overborne by three other cases deciding the point the other way, *i. e.* (*Mercereau agt. Powell*, 6 How. 294; *Benedict agt. Caffes*, 3 Duer, 669; and *Maloney agt. Dowe*, 18 How. 27); and because 3. They are wholly overborne by the standing rule (34) authorizing a case to be made in ten days after the trial if by jury, on which to move to set aside the verdict; a rule made and continued in the face of the fact that by the statute, *judgment must be entered* by the clerk on the coming in of the verdict and in conformity therewith.

Third. That there is therefore not only no current of authority to oppose to the

Muller agt. Sautler.

decision, on the opinion of Judge GROVER, in *Tucker* agt. *White*, but that the weight of authority and sound reasoning unite in establishing that decision as good law.

SUPREME COURT.

MULLER agt. SAUTLER.

On the settlement or withdrawal of proceedings on *attachment* issued under the Code, the *sheriff* is entitled to an amount at the rate of *poundage* on the levy of an execution.

New York Special Term, October, 1864.

MOTION on behalf of the sheriff of the city and county of New York for an adjustment of costs on attachment proceedings.

A. J. VANDERPOEL, *for motion.*
 , contra.

CLERKE, J. I do not agree with Judge LEONARD, that the services rendered by the sheriff in merely serving an attachment under the Code of Procedure, are such services as section 243 contemplates. These are services, undoubtedly, which the sheriff may render under title 7, which may be considered similar or equivalent to those rendered by trustees under the provisions of chapter 5, title 1, and part 2 of the Revised Statutes (3 R. S. 119, § 31, 5th ed). For instance, the duties he would have to perform under section 237 of the Code, chapter 4, and the said title 7, would impose upon him the labor of receiving the proceeds of sales, paying over so much of the same as may be necessary to satisfy the judgment. In case of the sale of any rights or shares in the stock of a corporation, he has to execute to the purchaser a certificate of the sale thereof. If any of the property has passed out of his hands, he has to repossess himself of the same. He has to proceed to

Muller agt. Santler.

collect the notes and other evidences of debt, and the debts that may have been seized or attached under the warrant, and to prosecute any bond he may have taken in the course of such proceedings. In short, in many instances, under title 7 of the Code, particularly under chapter 4, powers, duties and obligations, nearly, if not quite as onerous, devolve upon him as those which devolved upon trustees under chapter 5, title 1, part 2 of the Revised Statutes; and it is only in such cases, and for such services, he is entitled to the compensation allowed by section 243 of the Code. Instead of pronouncing a different decision from that in *Trenor* agt. *Fachin*,* I would have submitted to it on the

*In *Trenor* agt. *Fachin*, an attachment was issued to the sheriff of New York, under section 227 of the Code, for an amount exceeding \$16,000. The sheriff served it by leaving a copy with different persons who were supposed to be debtors of the defendant, or to have money or property belonging to him, to an amount presumed to be sufficient to pay the plaintiff's claim. The parties, in contemplation of a settlement or compromise before trial, submitted to the court the question as to what commissions the sheriff would be entitled to.

BROWN, HALL & VANDERPOEL, for sheriff.
JEREMIAH LAROCQUE, for defendant.

LEONARD, J. Section 243 of the Code, directs that the sheriff shall be entitled to the same fees, compensation and disbursements, as are allowed for like services and disbursements under 2 Revised Statutes, chapter 5, title 1. The services in this case are the same that are to be rendered by trustees under the chapter of the Revised Statutes referred to. No goods have been seized; credits only are attached. The compensation to trustees is provided in section 31, art. 8, of the said chapter and title (3 R. S. 119, § 31, 5th ed). It is all necessary disbursements, and a commission of five per cent. on the whole sum which shall have come into their hands.

In the case of a composition or settlement, there is no sum of money that comes to the hands of the trustees in the case of an attachment under the Revised Statutes, or to the sheriff on attachments under the Code, where the service has been made by notifying the debtors of the defendant.

The late supreme court gave a construction to the provision of the Revised Statutes relating to the commissions of trustees, in a case where a compromise had been made and no money came to their hands.

The true construction was given, without doubt, in the *Matter of Robert Bunch*, a non-resident debtor (12 Wend. 280). In the event of a compromise between the debtor and creditor, the rule is an equitable one. That rule, in case of a voluntary settlement between the parties, will give to the sheriff his commissions upon such sum as the debtor pays to the creditor, although it does not come to the hands of the sheriff, as well as his necessary disbursements.

Wheelock agt. Stewart.

ground of *stare decisis*, and would have recommended an appeal; but that decision is, in itself, a deviation from what I consider the current of decisions on such subjects in this court.

I adhere to my former decision in *Bartlett agt. Jessup*, and *Duncan agt. Bradstreet*. I repeat, in consideration of the great responsibility to which the sheriff is subjected in the discharge of his duties, I do not think it unreasonable to allow him, as a compensation on the settlement or withdrawal of such cases, an amount at the rate of poundage on the levy of an execution.

Let a bill be presented to me for taxation on the principles herein indicated.

SUPREME COURT.

ROBERT N. WHEELOCK, Administrator, &c., agt. ELLIOTT
W. STEWART.

Where a former guardian receives from his ward a general power of attorney, executed soon after the latter arrives at his majority, and under such power takes possession of the funds of the ward and appropriates them to his own use, he is liable to arrest for not paying over such funds when legally called upon, notwithstanding such guardian produces a letter from his ward written after he became of lawful age, but previous to the execution of the power of attorney, in which he says, "if you want to use any you are at liberty to do so."

The power of attorney did not confer the right to use the money, and the defendant was precluded from claiming it under the terms of the previous letter, as the power of attorney had superseded the letter. Besides, such contracts between a former guardian and his ward, though made after the latter becomes of lawful age, securing a benefit to the former, are suspicious, and are to be closely scrutinised, and generally disregarded by the courts.

Erie Special Term, July, 1864.

THE defendant moves for his discharge from arrest under an order made by one of the justices of this court. From the affidavits read, it is shown that he was formerly the

Whealock agt. Stewart.

general guardian of the plaintiff's intestate, who became of the age of twenty-one years the twenty-third of July, 1861. On the fourteenth of the following September he executed and delivered a formal power of attorney to the defendant, empowering him to receive and collect the money and property which had previously been subject to his authority as guardian. Under the authority so conferred, and an order made on his petition, the securities which had been taken and held by the county treasurer for the benefit of the ward, were transferred and surrendered to the defendant. From those he received and afterwards used the moneys in question. And for a failure to pay them over when requested, this action was brought and the arrest was made.

GEO. BARKER, *for plaintiff.*

H. C. DAY, *for defendant.*

DANIELS, J. The defendant denies his liability to be arrested for the act and default referred to, by reason of a clause contained in a letter written to him on the fourth of August, 1861, by Hall, the intestate, who was then in the military service of the government as a volunteer. The clause relied upon related to the money in question, and is in these words: "If you want to use any you are at liberty to do so." The letter containing it was written twelve days after the ward obtained his majority, before any settlement had taken place between him and his guardian, and while their former relations substantially subsisted.

Under these circumstances, contracts between them securing a benefit to the former guardian are suspicious. They are to be closely scrutinized, and generally disregarded by courts of justice. For the former ward to a very considerable extent, still continues subject to the influence and control of the guardian, and the advantage secured

Wheelock agt. Stewart.

is deemed to have resulted from that source. (*Parsons on Contracts*, vol. 1, 115, 116; *Tiffany & Bullard on Trusts, &c.*, 134, 136; *Hill on Trustees*, 334; *Gale agt. Wells*, 12 Barb. 84.) There is no substantial reason for excluding the present case from the operation of this principle.

But before the securities were received, or the money derived from them had been used, the power of attorney was given, founding and defining new relations between the defendant and his former ward. No privilege is secured by this instrument to make use of the moneys which might be received under the authority conferred. Neither is any intention manifested in it to continue the liberty to use it which had been previously given in the letter. On the contrary, so far as its form and tenor extend, it must be construed as denying that privilege by implication; for by its fair construction the defendant is subjected to the common obligation imposed upon persons bearing the relation created, of holding the money for his principal, ready to be paid over whenever it might be requested. That is the legal obligation arising from the form and object of the instrument. When it was executed and delivered, it became the only warrant of authority for the action of the defendant, superseding what, on that subject, had gone before it. (*Renard agt. Sampson*, 2 Kernan, 561, 566; *Story on Agency*, § 76.) And as the power of attorney did not confer the right to use the money, the defendant is precluded from claiming it under the terms of the previous letter.

The motion to discharge the order of arrest must be denied.

Garner agt. Wright.

SUPREME COURT.

AARON C. GARNER agt. HORATIO N. WRIGHT, Assignee, &c.,
and others.

Where an action is brought by a creditor under an *assignment for the benefit of creditors*, against the assignee and all other creditors who choose to come in and avail themselves of the benefits of the action, and demands judgment that the assignment be reformed and corrected in a particular which is not common to all the creditors, but concerns the plaintiff, and that the assignee be required to account, the complaint is not demurrable for a *defect of parties plaintiffs*.

1st. Because the creditors are not *all united in interest* in respect to the reformation of the assignment. 2d. They are not all united in interest with the plaintiff in *all the relief* sought by the complaint, which is a sufficient excuse for not joining them as plaintiffs.

The relief claimed in such an action is *not inconsistent*, and there is really but one *cause of action* stated, arising out of one transaction.

Albany General Term, March, 1864.

Before PECKHAM, MILLER and INGALLS, Justices.

THIS is an appeal from an order overruling a demurrer to the complaint in the above action. It appears by the complaint that Teunis H. Snyder and Peter Shufelt, on the 22d day of March, 1856, made a voluntary assignment for the benefit of their creditors to the defendant Wright, who accepted the trust and entered upon the execution thereof. It is further in substance alleged in the complaint that the note secondly described in schedule "B," as a note for \$1400, dated November 4th, 1856, signed by Snyder & Co., was by mistake described as *indorsed* by Snyder and the plaintiff, when it should be described as indorsed by one *Shufelt and the plaintiff*. That the plaintiff has been compelled to pay upon said note the sum of \$400. The plaintiff demands judgment that the assignment be reformed and corrected in the particular above stated, and that the defendant Wright render his account as such assignee.

HORATIO N. WRIGHT, *appellant in person.*

P. W. BISHOP, *for respondent.*

Garner agt. Wright.

I. This action is properly brought by the plaintiff in his own behalf, as well as others. (2 *Van Santvoord's Equity Practice*, p. 80; 25 *Howard's Pr. Rep.* 303.)

II. All parties interested in the fund are in court, and so far as defendant Wright is concerned, it is entirely immaterial whether they are so as plaintiffs or defendants.

III. There is not an improper joinder of actions, for in part there is but one cause of action set out in the complaint (9 *How. Pr. Rep.* 123). Section 167 of the Code provides as to joinder, &c. "The same transaction or transactions, connected with the same subject of action."

IV. There is not an improper joinder of parties (*Howard's Code*, 3d ed. p. 429, note 7). By section 274 of the Code, "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants. The object of this provision was to abrogate the common law rule, and to enable the court to award justice according to the rights of the parties, (20 *Barb.* 342; 1 *Kernan*, 294.) If a party is properly sued, he may insist that another ought to be sued with him, but he has no right to object that another who is sued with him is improperly made a defendant. (8 *How. Rep.* 389; 17 *New York Rep.* 592.) It cannot be said any more should be made defendants in this case, for all are made defendants whom the complaint shows alive (23 *How. Rep.* 97). It is not good cause of demurrer that too many are made plaintiffs and defendants (17 *How.* 56). An assignee may be joined with others as plaintiff (26 *Barb.* 16).

The Code says: "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved therein." An assignee may be made defendant with another who is claimed to have purchased the property in the hands of the assignee fraudulently (23 *New York Rep.* 264).

Garner agt. Wright.

V. If there are creditors who are not made parties, the objection can only be taken by answer. (2 *Paige*, 280 ; 3 *Id.* 222.)

VI. If amendments are necessary, they are allowed with great liberality as to parties. (*Barbour's Chancery Practice*, 206 ; *Id.* 209.)

By the court, INGALLS, J. I think it is a sufficient answer to the objection alleged as the first ground of demurrer, that the plaintiff claims relief which is not common to all the creditors under the assignment, viz. : the reforming of the instrument in the particulars above mentioned. In this the creditors *are not united in interest*, and hence should not be joined as plaintiffs, but are properly made defendants (*Van Santvoord's Pleadings*, 2d ed. p. 131). The following rule is laid down in relation to parties plaintiffs: "There must be one distinct general right, a community of interest, not merely in the subject matter involved, but also in the *relief demanded*."

Nor is the objection which is alleged as the second ground of demurrer, viz. : that Jeremiah Shufelt, Teunis H. Snyder and Peter Shufelt, should be joined as plaintiffs in this action, well taken. It does not appear by the complaint that they are all united in interest with the plaintiff in all the relief sought thereby, which is a sufficient excuse for not joining them as plaintiffs. The 119th section of the Code evidently contemplates a case where parties are united in interest *in all the relief claimed* in the action, and such is the obvious construction to be given to that section when compared with sections 117 and 118 of the Code.

Nor do I think the objection alleged as the third ground of demurrer well taken. There is really but one cause of action stated, arising out of one transaction, and the relief claimed is not inconsistent. All the rights of the parties interested can be settled in this action. Such being the case, two actions should not be tolerated. (*Gooding* agt.

Thorn agt. Couchman.

McAlister, 9 How. 123, 129; *Cahoun* agt. *Bank of Utica*, 7 N. Y. R. 486; *Van Santvoord's Equity Practice*, vol. 1, p. 100; *Jeroliman* agt. *Cohen*, 1 Duer, 630, 633; *N. Y. & N. H. R. R. Co.* agt. *Schuyler*, 17 N. Y. R. 604; *McKenzie* agt. *L'Amoureux*, 11 Barb. 516.)

The decision of the special term should be affirmed, with costs.

♦♦

COUNTY COURT.

THOMAS THORN agt. HIRAM COUCHMAN.

Witnesses cannot testify to the *value* of an article without *knowledge* of it. Thus, if witnesses testify that they have no personal knowledge of the *qualities* of a cow, they cannot be permitted to testify as to the *value* of her use for a given time. Assuming that she was an *ordinary* cow does not authorize the testimony.

Schoharie County Court, October, 1864.

THIS action was brought in a justice's court of Schoharie county, for damages on breach of warranty on the sale of a cow by defendant to plaintiff, whereby the plaintiff was deprived of the use of a new milch cow, which, by the terms of defendant's contract, was to become a new milch cow in the month of April, 1863. On the trial, the plaintiff put the following question to Willis Thompson, and other witnesses: "What would be the value of the use of the cow in question during the month of May, and up to the 10th of June, from the last of April, if she had come in, in the latter part of April?" This was objected to by defendant, 1st. That the witness was incompetent to judge of the value of the use of the cow. 2d. The witness had not been shown to know anything of her qualities or goodness.

The justice overruled the objection; the question was allowed to be asked of three witnesses. The justice ren-

Thorn agt. Conshman.

dered judgment in favor of the plaintiff for ten dollars and eleven cents. The defendant appeals to this court.

L. & N. W. FALK, *for appellant.*

MR. BALDWIN, *for respondent.*

LAMONT, County Judge. This action is sought to be maintained because the plaintiff was deprived of the use of a cow, which, by defendant's contract, was to become a new milch cow in the month of April, 1863. The contract and breach were established.

The question put to Willis Thompson, and other witnesses, as to the value of the use of the cow, was improper. They testified they knew the cow, but there is no evidence that they had any knowledge of her qualities. Two of the witnesses base their opinions upon what does not appear to be established by evidence, viz.: Upon the assumption that she was an ordinary cow.

The law allowing opinions as to value, has not yet gone so far as to allow witnesses to speak to such things without knowledge. In this case, Hover and Layman, two of the witnesses, testify that they had no personal knowledge of the qualities of this cow. Without knowledge of her qualities, they cannot testify as to the value of her use. For this reason I think the judgment of the justice should be reversed.

Billings agt. Waller.

SUPREME COURT.

THOMAS BILLINGS agt. JOHN WALLER, JR.

The Code has not changed the rule which requires *certainty and particularity* in stating the offence charged against a plaintiff in a plea of *justification*, in an action of *slander or libel*. The plea or answer must state specifically the offence of which the plaintiff is alleged to have been guilty, giving time, place and circumstances.

Orange Special Term, September, 1864.

THE complaint was for a libel. The libellous article was a pretended dream published in a newspaper in Sullivan county, of which the defendant is the proprietor. The libellous matter consisted in a statement in the dream that the plaintiff, who was a miller, had burned his mill to get the insurance money, and had sold wheat flour which was three-fourths stone peckings.

The answer of the defendant, among other things, stated as a justification, that the plaintiff "has practiced or caused to be practiced, dishonesty in taking tolls for grinding grain at his mill, and in retaining the flour therefrom, whereby his customers had been defrauded."

The plaintiff moved that the defendant should be directed by an order of the court to make his defence more definite and certain.

A. C. NIVEN, *for plaintiff*.

S. W. FULLERTON, *for defendant*.

BROWN, J. The defendant in his answer, and in justification of the slanderous and defamatory words charged in the complaint, sets up "that the plaintiff, as a miller in said mill, and at the time specified in the complaint, has practiced or caused to be practiced, dishonesty in taking tolls for grinding grain at his said mill, and in retaining the flour therefrom, whereby his customers have been

Chandler agt. Egan.

wrongfully cheated and defrauded." The plaintiff now moves to make this charge more definite and certain, by stating when and upon whom the plaintiff practiced the dishonesty in taking such tolls and retaining such flour.

The Code has not changed the rule which requires certainty and particularity in stating the offence charged against the plaintiff in a plea of justification in an action of slander. The plea or answer must not deal in general charges, nor in vague and indefinite language. It must state specifically the offence of which the plaintiff is alleged to have been guilty, giving time, place and circumstances. Without such particularity the plaintiff cannot defend himself. He cannot know what the charge really is, nor can he make the slightest preparation to repel a defamatory charge which is not only to defeat his action, but also to fix a stain upon his reputation. If the plaintiff in the present case has been guilty of dishonesty in taking tolls from grain and retaining flour which did not belong to him, thus defrauding and cheating his customers, the defendant in his answer must state and furnish the plaintiff with the names of the persons who have thus been defrauded and cheated, the times when and the kinds and quantities of grain and flour thus dishonestly taken and retained.

The plaintiff's motion is granted, with ten dollars costs of the motion.

SUPREME COURT.

WILLIAM H. CHANDLER agt. JOHN EGAN.

Where a person with a crowd of others enters the premises of another, knowing that admission thereto had been obtained only by an act of violence by another, he enters wilfully, and is liable as a *trespasser*.

New York General Term, May, 1864.

Chandler agt. Egan.

Before LEONARD, P. J., CLERKE and BARNARD, Justices.

APPEAL by defendant from a judgment at special term.

A. C. MORRIS, *for appellant.*

J. C. VAN LOON, *for respondent.*

By the court, LEONARD, J. The plaintiff was the occupant of the hall which was broken into. The defendant entered after the door was broken open. His act in entering was a trespass, although he took no part in breaking the door.

The judge was right in denying the motion to dismiss the complaint. The jury could not be instructed to limit their verdict to the actual damages which the defendant committed upon the plaintiff's property. The defendant invaded the rights of the plaintiff wilfully, by entering the hall where he knew admission had been obtained only by an act of violence.

The defendant's counsel asked the judge to charge that the defendant was rightfully there with the crowd that night, and that he is not answerable for the acts of the crowd, merely from the fact of his being there. The justice stated that he had substantially so charged, and declined to charge any further, and the counsel for the defendant excepted to the refusal so to charge. It was not true that the defendant was rightfully in the hall, and the learned justice could not have intended to assent to such a proposition. It must now be understood, as I think the request was taken by the judge, and as the counsel probably intended, that the defendant was near by at the room adjoining the hall where the election was held. Taking the request in that sense, it had no relation to the case. The defendant came into the hall among the foremost. The judge had not said anything from which the jury could infer that it was unlawful to attend the primary election, or go upon the premises adjoining the hall which

Moran agt. Morrissey.

was broken into. The judge had the right to refuse to charge any matter not material to the case. The damages are larger than the trespass warranted, in my opinion.

The judgment should be reversed and a new trial ordered, on payment within twenty days of the costs of the appeal and of the trial, unless the plaintiff signs and files a consent remitting \$150 from the amount of the verdict, within ten days after notice of this order, and in that case judgment is affirmed, without costs of the appeal.

NEW YORK COMMON PLEAS.

JOHN MORAN agt. JOHN MORRISSEY, and others.

A *bill of particulars* in an action for an indebtedness, should state the items of the demand, and when and how it arose, and the sums claimed.

In an action for money alleged to have been lost by the plaintiff at play, a complaint similar to a declaration in *indebitatus assumpsit*, under the former practice is not sufficient. The complaint must be *special*; the plaintiff must set out the facts and bring himself within the statute by force of which he claims to recover.

New York Special Term, July, 1864.

Before CARDOZO, Judge.

THIS is a motion to require the plaintiff to make the bill of particulars furnished more definite and certain, so as to apprise the defendants distinctly what the cause of action is which it is claimed exists against them.

The complaint states that between certain dates the plaintiff paid and advanced to the defendants sums amounting to \$11,750. It does not aver under what circumstances this money was paid to the defendants, nor that there was any agreement to refund it; but after the general allegation to which I have directed attention, the complaint proceeds to aver a request and refusal to return the amount,

Moran agt. Morrissey.

and then follows the usual statement as a conclusion from these facts, of indebtedness by the defendants to the plaintiff.

CARDOZO, J. It is not necessary to say whether this complaint discloses any cause of action. I only allude to its averments, to show that it presents a case in which the defendants cannot be deemed to be unreasonable if they seek further information than such a pleading contains. The bill of particulars furnished gives various items, each of which, except as to date and amount, is stated in the same language; for instance :

"1861, January 4.

"To amount advanced, \$200."

I think this is not sufficient. (See *Bates agt. Watkins*, 2 How. P. R. p. 18; 4 *Hill*, p. 50.) "The bill should set forth the nature of the plaintiff's claim with sufficient particularity to enable the defendants to meet it at the trial. It should state the items of the demand, and when and how it arose, and the sums claimed." (*Burrill's Pr.* vol. 1, p. 432; see also *Paine & Duer's Pr.* vol. 2, p. 150.)

This would dispose of the present motion, but from the affidavit of the defendant Morrissey, which is uncontradicted, and the points submitted on behalf of the plaintiff, probably this motion is resisted for the purpose of procuring an opinion as to whether, assuming the cause of action to be for money alleged to have been lost by the plaintiff at play, a complaint similar to a declaration in *indebitatus assumpsit*, under the former practice would be sufficient. While I have shown that, assuming such to be the case, the present bill of particulars is defective, I will proceed, as I have carefully examined the question, although not indispensable to the determination of this motion, to state the conclusion to which I have arrived. I think the complaint must be special; that the plaintiff must set out the facts and bring himself within the statute, by force of

Ward agt. Newell.

which he claims to recover (*McKeon agt. Caherty*, 1 *Hall's Supr. Ct. Rep.* p. 300).

The only case relied on by the plaintiff's counsel is *Collins agt. Ragnew* (15 *John. R.* p. 5). But that case was put on the ground that the statute as it then existed, expressly authorized the losing party to bring his action, and to declare generally for "money had and received by the defendant to the plaintiff's use, without setting forth the special matter" (1 *R. L.* 1813, p. 152, § 2). No such provision exists in the statute under which suits to recover money lost by betting or gaming are now brought (*Edmond's Stat. at Large*, vol. 1, p. 614), and as the ground upon which the case in 15th *John.* was decided has ceased to exist, that case is inapplicable. In any view, I think the motion must be granted.

Motion granted, with \$10 costs.

SUPREME COURT.

WARD agt. NEWELL.

The statute of *New Jersey* in reference to *limited partnerships*, is the same as that of this state (before the amendment of our statute in 1857), respecting the rights of the special partner.

Where a *special partner*, under a limited partnership formed in New Jersey, under the laws of that state, claims in an action brought here to recover upon promissory notes given to him by the *general partners*, and the referee finds that the notes were given for a good and valuable consideration by the general partners, by their firm name to the plaintiff, their special partner, and decides that the plaintiff is entitled to judgment, without finding whether the partnership firm was *insolvent or not*.

Held, that this court has a right to look into and ascertain from the whole case whether the firm was insolvent or bankrupt, and on finding that fact in the affirmative, the twenty-third section of our statute (1 *R. S.* 767, § 23), the same as that of New Jersey, is applicable to the case, and defeats the plaintiff's claim. This section of the statute reads as follows: "§ 23. In case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be allowed to claim as a creditor until the claims of all the other creditors of the partnership shall be satisfied."

Ward agt. Newell.

Where there is no proof to show that the special partner *intentionally* participated in violating the thirteenth section of the statute (same in New Jersey), requiring that the business shall be conducted in the names of the "*general partners*," without the addition of the word "*company*," he is not to be deemed a general partner.

New York General Term, February, 1864.

Before LEONARD, P. J., CLERKE and SUTHERLAND, Justices.

APPEAL by defendant from a judgment at special term rendered in favor of the plaintiff.

L. S. CHATFIELD, *for appellant.*

AUGUSTUS F. SMITH, *for respondent.*

By the court, CLERKE, J. In *White agt. Hackett*, a special partner claimed to share the assets of the copartnership with other creditors, for advances made by him for the business of the firm, over and above the amount of capital he had contributed. The statute of this state, relating to limited partnerships, expressly declared that no special partner shall, under any circumstances, be allowed to claim as a creditor until the claims of all the other creditors shall be satisfied. Of course, in the face of a provision so plain and so peremptory, nothing was left for the special term but to render judgment against the claimant. This judgment, by some unaccountable oversight or misapprehension, was reversed by the general term (*White agt. Hackett*, 24 *Barb.* 290). The other creditors instantly appealed to the court of appeals, and I need scarcely add, that the judgment of the general term was reversed, and that of the special term affirmed (20 *N. Y. R.* 178).

The case before us arises under a limited partnership formed in New Jersey, under the laws of that state, which are precisely the same with regard to this subject as those of New York were at the time the indebtedness in *White agt. Hackett* accrued. Indeed, the statute of New Jersey is an exact transcript of the provisions of the New York statute, and the 23d section of it is, word for word, the

Ward agt. Newell.

same as the corresponding section in the New York statute, to which I have referred, and from which I have above quoted. In the case before us, the referee finds that the plaintiff was a special partner, and that in the formation of the partnership the requirements of the law were strictly complied with, and that the notes for which this action was brought, were given for a good and valuable consideration by the general partners by their firm name, to the plaintiff, their special partner, and he decides that the plaintiff is entitled to judgment.

The only question that can arise in this case is, whether we can look into the whole case and ascertain whether the firm was insolvent or bankrupt; because if we can, and if we ascertain that it was, the twenty-third section of the statute unquestionably applies, and would defeat the plaintiff's claim. The referee does not expressly find anything upon this point. But the complaint alleges that the notes being many months due, an action was commenced against the general partners in the circuit court holden at Newark, in and for the county of Essex, and state of New Jersey, and that a judgment was recovered against them for the amount of the notes with interest, which remained in full force and effect, and unsatisfied, at the time this action was commenced in the state of New York. The defendant does not traverse the recovery of the New Jersey judgment. This surely is sufficient proof of insolvency or bankruptcy, according to the true spirit and meaning of the statute. Besides Jones, the defendant, testifies that although at one time it was believed the firm was solvent, it was subsequently ascertained to be insolvent.

The referee, therefore, should have found that the firm was insolvent. Instead of this, he in effect, though not in formal and express words, finds that it was solvent; for otherwise, he could not legally have decided in favor of the plaintiff. Finding impliedly or expressly in favor of the solvency of the firm, was palpably against evidence.

Ward agt. Newell.

With regard to the title of the firm, it appears that they employed the title of Darius E. Jones & Company. This no doubt is in violation of the 13th section of both the New Jersey and New York statutes. I am inclined to think that the provision of this section is not merely directory. To be sure it does not say if such title is used, that the special partner shall be deemed a general partner. But in *The Madison County Bank agt. Gould and others* (5 *Hill*, 309), it was held that the intentional violation of the statute by the special partners will have the effect of deeming them general partners. The violation of the statute committed by the special partner in the case to which I have referred, was the withdrawal of a part of the capital which he had contributed, and together with the general partners, purchasing with it real estate, and taking a conveyance of it to all the partners, general and special. This was a violation of section 15. This section, however, does not say expressly, any more than the 13th section, that the consequences of violating what it prescribes shall be that the special partner shall be deemed a general partner, yet such is the effect given to it in *The Madison County Bank agt. Gould*. The court, however, held that every violation of the statute must be shown to have been intentional on the part of the special partner. In the case under consideration, no proof was given to show that the plaintiff intentionally participated in violating the section requiring that the business shall be conducted in the names of the general partners, without the addition of the word "company." The judgment, however, should be reversed on the other grounds, a new trial ordered, and costs to abide event.

LEONARD, P. J., concurred, and SUTHERLAND, J., delivered the following dissenting opinion :

SUTHERLAND, J. The act of the legislature of New Jersey, was proved as a fact and found as a fact by the referee. He also found that the plaintiff and the defendants, in pur-

Ward agt. Newell.

suanee of the provisions of the act, made and executed a certificate for the formation of a limited partnership; that the certificate was duly acknowledged, and the affidavit required by the act duly made, and that the certificate and affidavit were duly filed in the office of the clerk of the proper county, and that they were recorded by the clerk as required by law, and that the terms of the partnership were published in the manner required by law.

It results from these findings of fact that the special partnership was duly formed; and the referee further found as a fact, that in pursuance of the terms of the certificate, the defendants were the general partners of said firm, and the plaintiff the special partner. I am inclined to think that the defendant's exception at the end of the case is too general to authorize him to question any or either of the findings of fact, but if otherwise, the findings appear to me to be authorized by the evidence. In adopting the firm name of Darius E. Jones & Co., for the limited partnership, the directory provision of section 13 of the act was disregarded; but as the name of the plaintiff, the special partner, was not used, such irregularity in the firm name did not make him a general partner under that section, I do not see how this irregularity affects any question in this case.

The only material question presented by the appeal is, I think, whether the plaintiff, having been a special partner when the notes were given, could bring an action at law upon the notes against the defendants, the general partners; whether a special partner upon loaning to or paying money for the general partners as a firm, outside of and beyond the amount to be contributed by him as capital as a special partner, becomes a creditor of the firm, and has the rights of a creditor, the same as if he were a stranger. Upon principle, I cannot see why he does not. He is a partner only as to the specific sum contributed by him as capital. There is sufficient authority, I think, for holding

Jay agt. De Groot.

that he may be such creditor, and may bring an action against the firm (*see Troubat's Law of Limited Partnership*, §§ 307 and 320).

The case of *White agt. Hackett* (24 Barb. 290), it seems was reversed in the court of appeals (20 N. Y. 178), but I do not see that there are properly in the case any questions growing out of the alleged insolvency of the limited partnership. There is no finding of the referee, nor was there any request for him to find, on that subject. There are no obligations on the pleadings to raise the question, or an issue as to the solvency or insolvency of the firm.

The judgment I think should be affirmed, with costs.

SUPREME COURT.

JOHN JAY, receiver, &c., appellant, agt. WILLIAM H. DE GROOT, THEODORE R. B. DE GROOT, and others, respondents.

Where an agreement is entered into between a creditor and his debtors for *staying the entry of judgment* against the latter, on certain conditions and payments being performed, and during the performance of the agreement by the debtors, the creditor without any previous notice to the debtors enters up judgment, issues execution and levies upon the debtors' property, the judgment and execution will be set aside with costs, and the judgment cancelled, even if the agreement was unlawful and could not be enforced by legal process.

New York General Term, May, 1864.

Before LEONARD, P. J., CLERKE and WELLES, Justices.

APPEAL from order at special term setting aside and cancelling the judgment entered in this action on the 11th of June, 1862, for \$2,279.09 against the above defendants, William H. and Theodore R. B. De Groot, for a deficiency arising on foreclosure of mortgage and the execution issued thereon, and that plaintiff be restrained from issuing execution thereon.

Jay agt. De Groot.

By the court, WELLES, J. We incline to think the agreement set forth in the respondents' papers was unlawful and could not be enforced by legal process. If it was a valid agreement, the defendants' right to relief, and to have the judgment set aside, and to be restored to the same condition they were in before it was entered, is clear. There is no contradiction of the facts stated in the affidavits on the part of the defendants, and they show that the judgment was entered up in palpable violation of the agreement.

On the other hypothesis that the agreement was unlawful, we think the same result substantially should follow. The agreement appears to have been entered into in sincerity, and under it the defendants have been induced to make large payments in money, and have done and performed everything on their part required by the agreement, and undoubtedly under the supposition and belief that the agreement was valid and binding upon both parties. If the plaintiff or his attorney intended to disaffirm or repudiate it, good faith required of them to apprise the defendants of such intention, in time to enable them to defend themselves against the proceeding of the plaintiff in entering up and perfecting the judgment. Instead of which the defendants were allowed to proceed in the performance of the agreement on their part, with the knowledge and participation therein of the plaintiff or his attorney, without an intimation on the part of the latter, that the agreement was not to be fully executed and performed by all the parties, until the sheriff called upon the defendants with the execution and levied upon their store of goods. To allow the plaintiff to retain his judgment and execution, would be to give him an unjust and unconscientious advantage.

The order of the special term should therefore be affirmed, with \$10 costs.

LEONARD, J. I think the entry of judgment was invoking the aid of the court at a time when, if notice had been

Fitzgerald agt. Blake.

served so that the other party could have been heard, the leave to enter judgment would have been denied.

The judgment should be set aside, with costs.

CLERKE, J., concurred.

SUPREME COURT.

DANIEL FITZGERALD, appellant agt. ANSON BLAKE, respondent.

Where a sheriff receives rents from a defendant's real property in an attachment suit, the court pending the litigation, will order the amount thus received to be applied on incumbrances upon the property, where the plaintiff's security is sufficient without it.

New York General Term, May, 1864.

Before LEONARD, P. J., WELLES and CLERKE, Justices.

By the court, LEONARD, J. The plaintiff appeals from an order directing a sum of money now in the hands of the sheriff, derived from the rents of real estate attached under a warrant of attachment issued in this action against the defendant as a non-resident debtor, to be applied to the satisfaction of an outstanding mortgage against one of the houses and lots so attached.

The right of the sheriff to collect these rents during the pendency of the litigation herein, to determine the right of the plaintiff to recover the demand alleged to be due from the defendant, has not been disputed. The plaintiff insists that the wife of the defendant is the owner of two of the houses from which some part of the rent was derived. This objection is met by the defendant fully, by obtaining the consent of his wife in writing, and filing it, to the application of the rent of these houses in the manner asked for by the defendant. I am unable to perceive that the security of the plaintiff will be in any way im-

Fitzgerald agt. Blake.

paired by the application of the rents in the manner asked for, while there will be a continual loss of interest if the money remains uninvested in the hands of the sheriff.

The order should be affirmed, with \$10 costs to the respondent, to await the final judgment in the action.

SUPREME COURT.

DANIEL FITZGERALD, appellant agt. ANSON BLAKE, respondent.

Where a plaintiff files a *notice of lis pendens*, in an attachment suit affecting real estate, it is improper to include therein any real property which the sheriff has *not levied upon* under the attachment. And where such a notice includes other premises than those levied upon, it will be held inoperative as to such additional premises.

New York General Term, May, 1864.

Before LEONARD, P. J., CLERKE and WELLES, Justices.

By the court, LEONARD, J. The plaintiff filed a notice of the pendency of this action, and this court at special term, on motion, directed it to be taken from the files. From this order the plaintiff appeals.

The action is for the recovery of money, and an attachment was issued therein against the defendant, as a non-resident debtor. The notice describes the premises which the plaintiff seeks to have subjected to his attachment, and includes a large amount of real estate not seized by the sheriff under the warrant of attachment. It was admitted on the argument that the sheriff had returned upon the said warrant the real estate which he had levied upon by a specific description. The right to file such a notice is expressly given by section 132 of the Code, whenever a warrant of attachment has been issued intended to affect real estate, but the notice must describe the property affected thereby,

Fitzgerald agt. Blake.

and state the names of the parties and the object of the action. It is the duty of the sheriff to attach so much of the property of the defendant as will be sufficient to satisfy the plaintiff's demand, with costs and expenses; the amount of the demand must be stated in the warrant in conformity with the complaint. In this case the sheriff has levied on so much as he considered sufficient. The extent of the seizure was within the exercise of a sound discretion by the sheriff. If his levy was excessive, the defendant might complain, and if insufficient, the plaintiff. He is responsible to both parties for the exercise of a sound and reasonable discretion in performing his duty. The plaintiff has no authority to dictate the extent of the levy, any more than the defendant has to limit him. The plaintiff can point out property to the sheriff, and require a levy upon so much as will be sufficient, but the sheriff must decide for himself upon the responsibility which attaches to his office, as to the extent and sufficiency of the seizure.

In the present instance the plaintiff attempts to affect real estate belonging to the defendant, by filing a notice of the pendency of the action, and including therein premises not seized by the sheriff under the attachment. In my opinion, the notice affects only those lands which the sheriff has attached, and is inoperative as to all other lands included therein. The notice may be oppressive in its operation upon the defendant, and obstruct him in the enjoyment of his property, upon which no levy has been made under the attachment. Such a contingency ought to be prevented. The plaintiff's attorneys were wrong, perhaps unintentionally, in including property in the notice which had not been levied on by the sheriff.

The order appealed from should be modified so as to amend the notice by striking therefrom so much of the premises therein described as have not been levied on under the warrant of attachment, according to the sheriff's return on the said warrant, without costs.

Ratsky agt. The People.

COURT OF APPEALS.

IGNATZ RATZKY agt. THE PEOPLE.

Where the crime of *murder* was committed while the act of 1860 was in full operation, the subsequent *sentence* of the convict should be the one prescribed by that act: That is, that he should suffer *the punishment of death*, after imprisonment at hard labor in the state prison for one year, &c., although that act does not in terms prescribe the punishment of death.

The *repeal* of the act of 1860 by the act of 1862 (*chap. 197, p. 368*), was wholly *prospective*, and did not affect the punishment of offences committed before such repeal.

Where a prisoner on trial for murder is found guilty, and before sentence, the legislature pass an act which in effect declares that when an *erroneous judgment is given in a court of original criminal jurisdiction*, the supreme court may, on error, reverse the judgment alone; but if there be no error in the trial or verdict, the record is to be remitted, to the end that a proper judgment may be pronounced:

Held, that this act having been passed after the conviction in this case, though before the sentence or judgment was passed upon the prisoner, it applied to the case, and required the appellate court, on determining that the original judgment was erroneous, to remit the case to the oyer and terminer, with directions to pronounce the proper judgment, instead of discharging the prisoner.

June Term, 1864.

WRIT OF ERROR to the supreme court to bring up the record and judgment on the trial, conviction and sentence of the prisoner for the crime of murder

S. D. MORRIS, *for people.*

S. H. STUART, *for prisoner.*

DENIO, C. J. The conclusions to which I have come upon the examination of this case are the following:

1. As the offence was committed while the act of 1860 was in full operation, the judgment should have been the one prescribed by that act, namely, that the convict should suffer the punishment of death, and that he should be confined at hard labor in the state prison until such punishment should be inflicted, but that he should not be executed in pursuance of such sentence within one year from

Batsky agt. The People.

the day of passing such sentence, nor until the whole record of the proceedings shall be certified by the clerk of the court of oyer and terminer of Kings county, under the seal thereof, to the governor of this state, nor until a warrant shall be issued by the governor, under the great seal of the state, directed to the sheriff of the county in which the state prison shall be situated, commanding the said sentence of death to be executed. The point that the act does not in terms prescribe the punishment of death has been considered by this court, and held not to be tenable (*Lowenberg agt. The People, September term, 1863, reported 26 How. 202*).

The judgment of the oyer and terminer which was affirmed by the supreme court condemned the convict absolutely to the punishment of death by hanging, on a day about five months after the conviction, without requiring any warrant to be issued by the governor. This was a wide departure from the mandate of the statute, and was clearly erroneous. It is claimed to have been justified by the effect of the act of April 12, 1862 (*chap. 197, p. 368*). The first section repeals the act of 1860, and another act not material to the present purpose. But that repeal was wholly prospective, and did not affect the punishment of offences committed before such repeal. This is expressly declared by the second section, which is in these words: "No offence committed previous to the time when this statute shall take effect, shall be affected by this act, except that where any punishment shall be mitigated by the provisions of this act, such provision shall control any judgment to be pronounced after the said act shall take effect for any offences committed before that time."

It is argued that the word offence as first used in the section, does not embrace the idea of punishment. But I am of opinion that such a construction would be altogether too narrow. The whole scope of the statute concerns the punishment of crimes; and when it is said that no offence

Ratsky agt. The People.

committed before it should come into operation should be affected by it, the meaning is extremely clear, that the punishment which it prescribes should not be visited upon the persons committing the offences which on account of the time they were committed are excluded from its scope. If it were otherwise doubtful, the exception which declares that a mitigated punishment should, notwithstanding the general language, be applied to the case of such former offenders, makes the sense very plain.

2. The remaining question is, whether the judgment should be reversed and the prisoner discharged according to the former rule, or the record be remitted to the oyer and terminer, to pass a legal sentence upon the conviction. This latter course is now authorized by statute (*Laws of 1863, ch. 226, p. 406*). The conviction was legal, and the sentence only was erroneous. The only question is, whether the act, having been passed after the conviction, though before the judgment was given in the supreme court, could be applied to the case. I am of opinion that it can be applied. The forms of judicial proceedings are under the control of the legislature. The case is not within the constitutional provision which forbids a person being twice put in jeopardy for the same offence. A person is said to be put in jeopardy only when he is a second time tried upon a criminal accusation, but the term has no relation to the reversal of an erroneous judgment, and pronouncing a legal one, pursuant to one legal conviction. It may be of some importance to inquire when the existing judgment was pronounced in the oyer and terminer, in reference to the time of the passage of the act of 1863. The narrative parts of the record would seem to show that it was on the 20th April, 1863, which is prior to the passage of the act. But the record also states that on the 25th of June following, a motion was made in the oyer and terminer for the arrest of judgment, and that it was denied on the 3d day of August ensuing. Such a motion can only be made on the

Hoffman agt. Van Nostrand.

verdict, and it must be before judgment. Taking the record together, we must intend that the sentence was pronounced on or after the 3d day of August. The case then is this: After the verdict had been given, and before sentence, the legislature declare in effect, that when an erroneous judgment is given in a court of original criminal jurisdiction, the supreme court may, on error, reverse the judgment alone; but if there be no error in the trial or verdict, the record is to be remitted, to the end that a proper judgment may be pronounced. If it could be maintained that the legislature could not rightfully interpose after the judgment had been pronounced, in such a manner as to deprive the prisoner of the full benefit of a writ of error under the existing laws, and of the right to have the judgment reversed, and to be discharged, the principle would not aid the plaintiff in error, for such was not the order of the events. I conclude, therefore, that the supreme court should have reversed the judgment which was actually given, and have remitted the record to the oyer and terminer, with direction to pronounce the judgment prescribed by the act of 1860, the form of which has been indicated.

If I am sustained by my brethren in these views, such is the judgment which must be given on this writ of error.

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SUPREME COURT.

HOFFMAN agt. VAN NOSTRAND and others.

Where a bank takes stock from an individual as collateral security to the payment of his promissory note, and then sells the stock, and subsequently on the expiration of their charter, they assign all their property and assets for a valuable consideration, to a new and distinct bank formed under another law, the latter assuming specifically certain debts and liabilities as a part of such consideration; the owner of the stock cannot maintain an action against the latter bank for the value of the stock on tendering the amount of the note, where there is no proof that the latter bank ever received any amount sufficient to pay the claim, or any other claims against the old bank.

Hoffman agt. Van Notstrand.

New York General Term, May, 1864.

Before LEONARD, P. J., CLERKE and BARNARD, Justices.

By the court, CLERKE, J. I think the referee erred in the reasons upon which he based his decision, although the decision itself is correct. The statute of limitations has nothing to do with this case. If the defendants were liable at all, no cause of action accrued until the plaintiff tendered payment of the note, and demanded a return of the stock which had been given as collateral security. The defendants refused to receive the money and to return the stock, on the ground that they could not comply with the demand, as the stock had been sold by the old bank before it had sold out to the new bank. Having thus absolutely declined to receive the money, it mattered not whether the person making the demand had the money in his possession at the time or not, and if these defendants were liable at all, a right of action accrued immediately on this refusal.

Assuming then that the demand and tender were properly made, are they liable? The defendants are sued as trustees of the late banking corporation, known as the president, directors and company of the Merchants' Exchange Bank. The charter of this association having expired, the president and directors assigned all its property and assets, for a valuable consideration, to a new and distinct corporation formed under the general banking law, the latter assuming specifically certain debts and liabilities as a part of the consideration of the transfer. The old association, previous to its dissolution, sold the stock, the value of which the plaintiff seeks to recover from the defendants. There is no proof that the defendants ever received any assets, or that they ever received any amount sufficient to pay this claim, or any other claims against the old bank. The statute declaring that the directors and managers of any corporation shall, upon its dissolution, be the trustees of the creditors and stockholders, fixes no such liability as is

Brotherson agt. Consalus.

claimed on behalf of the plaintiff in this case ; on the contrary, it expressly limits the liability to the extent of the property and effects that shall come into their hands.

Even if a right of action against the new bank could be deemed property and effects, within the meaning of the statute, still no such right of action relating to the stock in question can accrue to the defendants. The debts and liabilities of the old bank assumed by the new, are specifically set forth in the bill of sale, and the plaintiff's claim is not among them. So that whether the sale of the plaintiff's stock was rightfully or wrongfully made by the old bank, the defendants are not liable as trustees, or in this form of action.

The judgment should be affirmed, with costs.

SUPREME COURT.

JOHN BROTHERSON, respondent agt. EMANUEL CONSALUS,
appellant.

CONSALUS, appellant agt. BROTHERSON, respondent.

Can this court at a *general term*, in an action which arose in their district, on setting aside a default on appeal in the action, which was taken at a general term of an adjoining district, and directing that the cause be heard on the appeal at the next general term in the *former district*, which motion was opposed, deprive the court in the *latter district* from hearing the appeal, when it is regularly noticed in the latter court?

In other words, does the order of one general term which is granted on opposition, setting aside the default taken at another general term in an adjoining district, where the cause was regularly noticed, and directing the appeal to be heard in the district where the order is made, *per se* stay the hearing of the appeal in the adjoining district?

Albany General Term, December 5, 1864.

Before PECKHAM, MILLER and INGALLS Justices.

THE defendant appealed in the first above cause from a judgment of Justice BOCKES.

Brotherson agt. Consalus.

In the second cause the plaintiff appealed from an order of Justice ROSEKRANS, made the fourth Tuesday of August, 1864, setting aside the plaintiff's judgment for alleged irregularity. The place of trial is Saratoga county, fourth district.

The counsel for the appellant regularly noticed each appeal for argument at the Albany general term, held in the third district in September, 1864, that county adjoining Saratoga. The respondent did not appear at the September term, and his default was taken in each case. The respondent made an affidavit, saying he got left by the cars the first day of that term, and upon that ground moved at the October general term, in the fourth district, to open the defaults, which motions were granted, as follows:

"Motion to open defaults granted, appeal to be heard at the next Schenectady general term, without further notice, on condition that the respondent within twenty days after the service of this order pay to the appellant's attorney \$10 costs of this motion, and in case of non-payment of such costs, then the motion is denied with \$10 costs."

The respondent paid the costs in time. Thereupon the attorney for the appellant noticed the causes for the Albany general term, to be held December 5th, 1864, and the first cause was placed on the calendar. At the opening of this term,

JOHN BROTHERRSON, *in person*,

moved to strike the first cause from the calendar, and that the court do not hear the other, on the ground that the aforesaid order granted in the fourth district prevented the hearing of the causes in the third district, and operated as a stay against the appellant's bringing on the causes here.

E. F. BULLARD, *opposed said motion*,

Brotherson agt. Consalus.

and read an affidavit that he opposed the order granted in the fourth district, and that it was not made by his consent.

I. For the appellant, he contended that the fair construction of the clause in the order directing the cause to be heard at Schenectady, without further notice, was, that it was imposed as a condition upon the respondent, but not upon the appellant; that the appellant need not take advantage or accept of such condition; that the Schenectady term does not occur until January next, and it is not reasonable that the court intended to delay the appellant, who is endeavoring to forward the arguments.

II. That any other construction would assume that the court in the fourth district had not treated the court in the third district with proper comity, and might lead to the inference that the court in the fourth district desired the case to be heard before it, because the decisions below had been made by single justices who would compose the appellate court in that district.

III. That such order could not in any sense be construed as a stay, or any special direction that the appeal should be heard *only* in such fourth district, because no such motion was made in the fourth district, and no cause is shown for such order, unless the fact that the appeals in that district would be heard before two of the judges who had made the decisions below, is to be deemed such cause. The term for the third district first occurred in September, at Albany, and as that county adjoins Saratoga, the statute gave the appellant the right to notice the cause there without waiting until October, and travelling over two hundred miles to St. Lawrence county to attend that term (*Code*, § 346).

THE COURT denied the motion, and held that the appellant had the right to bring on the appeals at this term. The appellant then moved the argument in the second cause. The respondent stated he wished time to prepare

McCardel agt. Peck.

for the argument, and at his request both causes were set down for the first Thursday of this term.

On that day, JOHN K. PORTER, counsel for the appellant appeared, but the respondent did not appear, and his default was taken in the second cause, reversing the order of the special term, with costs.

SUPREME COURT.

JERUSHA MCCARDEL agt. DELAVAN PECK.

A party will be restrained by injunction from the continued use of a *trade mark* belonging to another, which he has used under an agreement and with the consent of the owner, and for the benefit of both, after the owner shall withdraw his interest from the business, and claim the use of his trade mark exclusively, unless the party claiming to use it shall show clearly by the agreement that the owner intended to and had forever parted with his right to the use of such trade mark.

The court may allow the use of the trade mark to a certain extent in such a case, where apparently it will work no injury or damage to the owner, and would be a serious damage to the other party to restrain its use.

Where an *injunction order* served, is definite and peremptory, the defendant must obey it, or at once procure an alteration or dissolution of it (under § 324 of the Code). If he fails to do either, an attachment for *contempt* will issue against him.

Albany General Term, March, 1864.

Before PECKHAM, MILLER and INGALLS, Justices.

APPEAL from order of special term denying motion to dissolve injunction, and directing an attachment to be issued for its violation.

This action was brought by the plaintiff to restrain the defendant from a further and continued use of the name of the "McCardel House," in his business, or in or upon the building wherein the same was conducted, in the city of Albany, or in any other manner whereby the rights of the plaintiff are prejudiced. An injunction was issued on the 23d of July, 1863, by which the defendant was required

McCardel agt. Peck.

to refrain on and after the 23d of August, 1863, from using said name until the further order of the court. The defendant now moves to dissolve said injunction, and the plaintiff moves for an attachment against the defendant for continuing to use said name after the 23d of August, the time specified in the injunction order.

The complaint in this action alleges that the plaintiff's husband had been engaged in carrying on the business of a restaurant, under the name of the "McCardel House." That the plaintiff succeeded to said business with the consent of her said husband, and that the name became popular. That the defendant started a restaurant in Albany, and by signs upon the walls of the building, by advertisement, by letters on dishes, plate and silver ware, called said building the "McCardel House." That the plaintiff was thereby injured, and claims to recover damages, and asks for an injunction restraining the defendant from using said name, &c.

The affidavits upon which the motion to dissolve the injunction in this cause is made, show that certain individuals assisted William P. Hitchcock in procuring means to furnish the restaurant called the "McCardel House," in Broadway, Albany, and that it was opened and has since been continued as the "McCardel House," with the knowledge, consent and agreement of John McCardel, who was employed as an agent or assistant of said Hitchcock until May, 1862, when McCardel left the employment of Hitchcock, who continued the business in the same name until May, 1863, when he sold out to the defendant.

The affidavits of the plaintiff show that the business was started in the name of Hitchcock, who was a brother-in-law of McCardel, for the benefit of McCardel, who was employed as an assistant, and interested in the success of said business, and the building was designated the "McCardel House," and some of the signs theretofore used by McCardel were used in or upon the premises; that neither

McCardel agt. Peck.

McCardel or his wife sold the right to the use of such name, nor the goodwill of the business, nor the signs, nor has McCardel assented at any time to the use of said name except while directly benefitting him or his wife; that hearing it was contemplated by Hitchcock to sell said premises to the defendant, he called upon the defendant prior to the sale, and informed him that the right to use the name belonged to the plaintiff; that he also called upon one of the individuals who assisted Hitchcock, who promised him that the use of his name should be discontinued, and that it would be a good time to do it when the defendant took possession of the premises.

The motion to dissolve the injunction was denied, and the motion for attachment granted. The defendant appealed from these orders to the general term.

C. B. COCHRAN, *for defendant and appellant.*

GEO. WOLFORD, *for plaintiff and respondent.*

By the court, MILLER, J. It appears to be conceded that the name of "McCardel House" was used originally at the place of business now occupied by the defendant, by his predecessor, Hitchcock, with the knowledge and consent of John McCardel and of his wife, the plaintiff in this action. The original arrangement with Hitchcock, of whom the defendant purchased, was made for the benefit of John McCardel himself, who was employed as an agent or assistant in the establishment. The terms upon which he was thus engaged do not distinctly appear, but there is sufficient to show that the object of the arrangement was to assist McCardel in business, or rather to furnish him employment. McCardel left the business, and hence so far as he was concerned, he derived no benefit from conducting it in that name afterwards.

The question then arises whether the consent given by John McCardel to the use of his name in connection with

McCardel agt. Peck.

the business was revocable, and actually revoked by McCardel or his wife. A person may undoubtedly consent to the employment of his name for such a purpose, but if such consent be purely gratuitous, or unless there is some valid agreement binding upon the party who thus gives such consent, it may be withdrawn at the pleasure of such party (*Amoskeag Manufacturing Co. agt. Spear*, 2 Sand. S. C. R. 615). Whether there was a valid contract in this case so as to deprive the party forever afterwards from the use of his name, must depend very much upon the fact whether the original agreement established any such contract. There was certainly no specific agreement to that effect, and had it been intended to place the matter beyond any question, such a provision would have accomplished that purpose. The only consideration for the arrangement was that McCardel was to be benefited thereby. This has failed by the withdrawal of McCardel from the business, and therefore it cannot be claimed that such a consideration still exists. I incline to think that the consideration having failed, the agreement to use the name was ended, and McCardel had a right to revoke his consent previously given.

The party entering into such an arrangement with another person, should provide against a difficulty of the character now presented. If he chose to accept a mere verbal permission to use a name in his business, without any positive agreement as to time and permanency, and run the risk of the arrangement being broken up by a disagreement, he has no right to complain because such a contingency, which could have been averted and avoided, has arrived. He should have been more careful in guarding against a possible rupture between the parties to the contract. But with whatever force it may be urged in favor of Hitchcock that he acted under a belief that the employment of McCardel's name was to remain permanent, the same argument can scarcely be said to be applicable to the

McCardel agt. Peck.

defendant, who was duly notified by John McCardel that he claimed the exclusive right to use the name. The defendant purchased with full knowledge of McCardel's claim, and therefore has less grounds for complaint if it is enforced.

The use of names and trade marks in business when made valuable has always been protected by the courts, and any improper appropriation of them without the authority of the owner will be restrained by injunction. It has never been held that a mere consent or acquiescence in the use of a name or trade mark conferred an absolute and an irrevocable right which could not be annulled. While it may temporarily transfer and impart a right, it by no means follows that such a right is so fixed and determined that the original owner is forever afterwards debarred from revoking a permission previously given. The extent and character of the privilege thus conferred, must depend very much upon the agreement and the circumstances of the case, and I think it should be quite clear that a party had parted forever with his right to the use of his name which he had made valuable, before the courts are authorized to hold that such was the intention. (*See Howard agt. Henriques*, 3 *Sanf. S. C. R.* 725, 727; *Peters agt. Humphrey*, 4 *Abb.* 394; *Howe agt. Searing*, 19 *How.* 14.)

It is urged that large expenditures have been made and incurred, the name having been engraved upon the plate and other articles, so as to render them useless if the injunction order is sustained. As the plaintiff's husband consented to the property being thus marked, and as these articles would necessarily become valueless if the injunction is continued in force as to them, and as the use of them with the name upon them, of itself, would produce no serious injury to the plaintiff's rights, I think the injunction should be modified as to them, and should only be retained so as to prohibit the use of the name "McCardel House" by

McCardel agt. Peek.

the defendant upon his building in Albany, or as a business sign in conducting his establishment.

It is claimed that the wife of John McCardel, cannot, under any circumstances, maintain this action. The complaint alleges that the plaintiff succeeded to her husband's business and to the use of his name, with the consent and agreement of her said husband, and I think this is a sufficient claim to the use of the name as against the defendant, who has no legal right thereto from the husband, so as to enable the plaintiff to maintain the suit.

At the same time when the motion to dissolve the injunction was made, the plaintiff moves for an order that an attachment as for a contempt be issued against the defendant for a violation of the order of injunction. It is admitted that the defendant has not refrained from the use of the name "McCardel House," and that he has continued to use it, but it is said he has moved at the first special term after the time for refraining to use the name was fixed, to dissolve the injunction, and hence he is not in contempt. I think the defendant furnishes no sufficient excuse for violating the injunction order. He could have moved for a modification of the order if too onerous, or it was desirable that the time should be further extended, under section 324 of the Code. He has no right to wait until the expiration of the time fixed, and to continue its violation, and then make his motion. The order is definite and peremptory, and he must be prepared to obey it or procure an alteration of its mandate. The defendant was clearly guilty of a contempt in using the name in violation of the order after the 23d of August, and for that contempt was liable to an attachment.

With the views expressed, the order directing that an attachment issue for a violation of the injunction should be affirmed, with ten dollars costs. And the order denying motion to dissolve the injunction should be modified as before stated, without costs to either party.

Andrews agt. Rowan.

SUPREME COURT.

WM. A. ANDREWS, respondent agt. JAMES A. ROWAN, appellant.

Where pending an action brought by the plaintiff for the *conversion* of personal property *exempt* from levy and sale upon execution, a *receiver* of the plaintiff's property is appointed in proceedings supplementary to execution, the right of action which the plaintiff has in the pending action *does not pass to the receiver*. The right of action not vesting in the receiver, there is no ground to claim that the *judgment* thereafter recovered vested in him.

And in case of the appointment of another receiver of the plaintiff, whose appointment would be *subsequent* to the recovery of the judgment in the pending action, such receiver would not be entitled to the proceeds of the judgment as against the plaintiff.

Erie General Term, September, 1864.

Before DAVIS, P. J., GROVER, DANIELS and MARVIN, Justices.

APPEAL from order of Genesee county court, refusing to direct the sheriff to return satisfied an execution (for the conversion of exempt property) which he had against defendant Rowan, and the judgment in which case Rowan claimed passed to Andrews, receiver, to whom Rowan paid or tendered payment of the judgment.

GEO. BOWEN, *for respondent.*

WAKEMAN & BRYAN, *for appellant.*

By the court, GROVER, J. The affidavits used upon the motion before the county judge, showed that the action in which the respondent recovered the judgment upon which the execution which the appellant sought to have an order directing the sheriff to return satisfied, was issued, was brought to recover for the conversion of property exempt from levy and sale upon execution; that the action was pending at the time of the appointment of a receiver of the plaintiff's property in proceedings supplemental to execution, in the Genesee county court, upon appeal; that

Andrews agt. Rowan.

the cause was thereafter tried and a verdict for the respondent rendered, upon which the judgment was entered. I think it clear that this right of action did not pass to the receiver. It was founded upon an injury to property which the creditor had no claim to have applied to the payment of his debt. The property was taken from the respondent without his consent, and he had the right of election either to prosecute the action to judgment and collect damages, or discontinue the same and sue to recover the possession of the specific property. With the exercise of this right neither the creditors of the respondent nor the receiver could at all interfere. The right of action not vesting in the receiver, there is no ground for claiming that the judgment thereafter recovered vested in him, consequently the judgment debtor had no right to pay the same to the receiver, and such payment did not satisfy the judgment (*Hudson agt. Pletz*, 11 *Paige*, 180). This view disposes of the motion, but as another receiver may be appointed, whose appointment would be subsequent to the recovery of the judgment, it may be well to consider whether such receiver would be entitled to the proceeds of the judgment as against the respondent.

The statute exempting certain property of the debtor from execution, should be fairly construed, to enable the debtor to enjoy such property. If when such property is wrongfully taken from the debtor, against his will, the law does not afford him an adequate remedy for the injury, and protect him in its enforcement, the statute is to the extent of the failure rendered nugatory. If the judgment rendered for the injury may be acquired by a judgment creditor, by proceedings supplemental to execution, there would be nothing to prevent seizing exempt property, selling it upon execution, and when the debtor had sued and recovered a judgment therefor, compelling the application of such judgment to the payment of the debt for which the property was seized, thus entirely depriving the debtor of

Kelly agt. Lane.

the exemption, and enabling the creditor in this way to collect his debt from property that the law has declared not liable for its payment; such construction if the language will permit, should be adopted as will secure the debtor in the enjoyment of the exempt property, and afford him an adequate and complete remedy for a violation of his rights. This can only be done by holding a judgment recovered for the conversion of such property, and its proceeds, exempt, until from lapse of time or other act of the debtor, it may be fairly presumed that he has abandoned the intention of procuring articles exempt with such proceeds, when the proceedings of the creditor would reach the same. It is true that when a debtor voluntarily disposes of exempt property, the proceeds may be reached by his creditor, but by so doing he voluntarily deprives himself of the benefit of the statute, and waives the privilege thus secured (*see Hudson agt. Pletz, supra*). I know it may be said that the debtor may preserve his right by bringing an action to recover the specific property taken, but this may be defeated by placing the property where delivery cannot be obtained, and thus defeat that part of the remedy.

The order appealed from should be affirmed, with costs.

SUPREME COURT.

JOHN KELLY, sheriff, &c., appellant agt. WILLIAM G. LANE,
and others, respondents.

It must now be considered as settled by the court of appeals in *Rinchey agt. Stryker* (26 How. Pr. R. 75), that the title of a *sheriff* to property seized under an *attachment* may be maintained against any action brought by the assignees for the benefit of creditors of the defendant in the attachment suit, notwithstanding that *no judgment has been recovered* in the attachment suit.

Under section 232 of the Code, a sheriff holding an execution on a judgment in an attachment suit unsatisfied, may maintain an action in *his own name as sheriff*,

Kelly agt. Lane.

to set aside as fraudulent and void an assignment of the judgment debtor's property, which has been converted into money by the assignees and deposited with a banking company so as to create the relation of debtor and creditor between the assignees and the company (SUTHERLAND, J., *dissenting*).

New York General Term, September, 1864.

Before LEONARD, CLERKE and SUTHERLAND, Justices.

APPEAL by the plaintiff from a judgment at special term on a motion for a new trial.

THOMAS H. RODMAN, *for appellant.*

JEREMIAH LAROCQUE, *for respondent.*

By the court, LEONARD, J. The only property of the debtors in the attachment suit upon which service could be made by the sheriff, passed under an assignment from them to Wiley & Lawrence, made in trust for the benefit of creditors. This assignment was assumed by the learned justice before whom this action was tried, to be fraudulent as to creditors, and no facts were found by him upon the issues made by the pleadings in that respect, but the complaint was dismissed upon the sole ground of the want of authority in the sheriff to maintain this action. It will be assumed, therefore, in considering the appeal herein, as it was by the justice below, that the assignment was and is fraudulent as to creditors.

Had the assigned property, consisting of merchandise, the proceeds of which in cash, are deposited in the United States Trust Company, to the credit of the said assignees, remained in the hands of the said assignees as merchandise, at the time the attachment was issued to the sheriff, it cannot be disputed that it might have been seized, and that the sheriff might have maintained his title under the attachment against any action brought by the assignees to recover its possession or value, upon the ground that the title of the assignees was fraudulent and void as to creditors, of whom the sheriff would stand as the representative. And this defence would be open to the sheriff

Kelly agt. Lane.

notwithstanding no judgment had yet been recovered in the attachment suit. These principles are now settled after considerable conflict of legal authority, by the court of last resort in this state, all the judges of that court concurring (*Rinchey agt. Stryker*, 26 *How. P. R.* '75).

It has been held in this action by the judgment at special term in substance, that the attachment issued on behalf of creditors against their debtors, cannot be made effectual to reach the property of these debtors so assigned, notwithstanding the fraudulent character of the assignment, because the property is no longer tangible, but has been converted by the assignees into money, and so deposited in the trust company as to create the relation of debtor and creditor between the assignees and the said company in respect to the fund. If this proposition is correct the judgment must be affirmed, otherwise the plaintiffs will be entitled to a new trial.

It is made the duty of the sheriff to collect and receive into his possession all debts, credits and effects of the defendant against whom an attachment has been issued (*Code*, § 232). The sheriff is to make such collections, subject to the direction of the court or judge, and it is not probable that he would be allowed to collect any greater sum than would be sufficient to satisfy the demands for which the process in his hands had been issued, and perhaps he might not be permitted to collect debts, &c., in case there was tangible property upon which the attachment could be levied. Clearly the sheriff would be permitted in a proper case to maintain an action to recover money due from any person to the debtor in the attachment, upon open account, bond, bill, note, check, &c.

What significance is to be given to the word "effects," contained in section 232? It is used to mean something in addition "to debts and credits." Is money or other effects fraudulently disposed of by a debtor, and attempted to be concealed from his creditors, to be held beyond the

Kelly agt. Lane.

reach of an action by the sheriff under this section, on the ground that the relation of debtor and creditor does not exist between the defendant in the attachment and the fraudulent possessor? The money or other effects fraudulently concealed or disposed of, would, as to judgment creditors, be considered the property of the debtor in the attachment. It is true the fraudulent assignor could maintain no action to recover his money or property so disposed of. As against him the fraudulent title may be valid. The objection as against a creditor is very different. A judgment creditor having an execution returned unsatisfied, can maintain his action in a court of equity to have any fraudulent disposition of his debtor's money or other property set aside on the ground of fraud, and applied to the satisfaction of his judgment. This relief is granted under the equitable power of the court, without any lien on the part of the creditor. Here it is the assignment only that prevents the money deposited by the fraudulent assignees from being considered assets of the debtors, in the attachment at common law.

It cannot be said that the sheriff must be denied all relief in the courts under section 232, except that which is usually denominated of a common law character. Unless we are to adopt such a rule, there can be no good reason for holding that a sheriff may not come into a court of equity to break down a fraudulent barrier that prevents him from collecting the effects of the debtor in an attachment by a common law action, and having taken cognizance for that purpose, proceed to administer that justice which the case may require on the merits.

There is no distinction in principle between the rule which permits the sheriff to impeach the title of a fraudulent assignee of a debtor in an attachment, in order to maintain his seizure of property belonging to such debtor in an action brought against the sheriff, and permitting the affirmative assertion of fraud in an action brought by

Kelly agt. Lane.

the sheriff to recover debts, credits or effects of the debtor in the attachment held by an assignee of the debtor under a title fraudulent as against creditors. The moment the assignment from these debtors shall be declared fraudulent as to their creditors by a court of competent jurisdiction, the money deposited to the credit of their assignees becomes credits or effects of the debtors, liable to be recovered by the sheriff in an action under section 232.

The true and liberal construction of this section of the Code requires us to hold that debts, credits or effects, held under a fraudulent title from a debtor in an attachment, are to be considered as the debts, credits or effects of the debtor, when the question is between the party holding under such fraudulent title and an attaching creditor, or the sheriff who represents such creditor. This principle is necessarily to be implied from the provisions of the Code in relation to the remedy by attachment, and the decision of the court of appeals before adverted to. It is the application of a principle analogous to the relief afforded by a court of equity in removing an impediment which prevents a creditor from obtaining satisfaction by a levy and sale on an execution.

The principle insisted on by the learned counsel for the respondents, and recently applied by this court in another case, by which the trust company was denied the right to interplead the attaching creditors and their depositors, Wiley & Lawrence, assignees of Lane, Boyce & Co., in respect to the fund in question has no application here.

While it may be true that the trust company could not be permitted to call in question in a court of justice the right of their depositors to the money deposited with the company to their credit, it by no means follows that a creditor, or the sheriff representing a creditor under an attachment, may not impeach the title of the depositor to the same fund. The theory of that decision was, that it was the business of the creditor to enforce his rights, and not for

Kelly agt. Lane.

the trust company to volunteer for the purpose of raising a litigation which the creditor might not think proper to encounter. It was suggested at the argument that the attaching creditors if successful here would obtain an advantage over prior actions by judgment creditors which had been commenced, to have the assignment in question declared to be fraudulent and void. No such fact appears from the papers in this case, but if there are such suits, the result anticipated need not follow. The determination of the present action affects only the parties to it. Whenever other parties shall make it appear to the court in a proper proceeding for that purpose, that they have prior or better rights to the fund in question, the judgment in the present case can be no obstacle to their obtaining it. We adjudge only upon the rights of the parties before the court in the present action.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

SUTHERLAND, *J. dissenting.* On the fourth of March, 1861, Lanes, Boyce & Co., a New York firm, being insolvent and largely indebted among others to August Belmont & Co., made a general assignment of all the property and assets of the firm to Leroy M. Wiley and Fred. N. Lawrence, for the benefit of their creditors. On the 17th of June, 1861, Belmont & Co. commenced an action in the supreme court to recover their debt. Subsequently, and on or about the 24th of June, 1861, an attachment directed to the sheriff of the city and county of New York, was issued in the action, on the ground that Lanes, Boyce & Co. had assigned and disposed of their property with intent to defraud their creditors.

Wiley and Lawrence, the assignees, accepted the assignment and acted under it, and when the attachment was issued in the action of Belmont & Co., had, as assignees, deposited with the United States Trust Company \$60,000, a portion of the assigned property, or of the proceeds of the

Kelly agt. Lane.

assigned property. Subsequently, and on the 25th of June, 1861, the sheriff undertook to attach, and so far as he could, did attach the funds so deposited by the assignees with the trust company, by leaving a certified copy of the attachment with the secretary of the company, with a notice showing that he intended to attach such funds. On the 9th day of July, 1861, Belmont & Co. recovered a judgment in the attachment suit for \$38,328.27, on which an execution was issued, which execution had not been returned, but remained in the hands of the sheriff wholly unsatisfied when this action was commenced, August 21, 1861, by the sheriff, in his own name as sheriff, to have the assignment of Lanes, Boyce & Co. declared void as against Belmont & Co. and the sheriff, and to recover from the trust company enough of the funds so deposited with the company by the assignees, to pay the judgment of Belmont & Co. The justice before whom the action came on for trial at the special term, dismissed the complaint on the ground that the sheriff had no right to bring the action. My associates think that he had, and have come to the conclusion that the judgment of dismissal should be reversed. I think the complaint was properly dismissed, on the following grounds:

1. The sheriff had no interest which gave him the right to be the plaintiff in the action. The action is brought for the exclusive benefit of Belmont & Co., the judgment creditors. If the assignment is declared fraudulent and void, and the sheriff recovers the money, he will of course pay it over to Belmont & Co. If the assignment was or is fraudulent and void, it was and is fraudulent and void as to the creditors, not as to the sheriff. Not only had the sheriff no interest which could properly make him the plaintiff, but he is wholly a volunteer plaintiff, unless the service of the attachment on the trust company made it his duty as sheriff to bring the action.

2. It cannot be seriously claimed that the sheriff had a

Kelly agt. Lane.

right to bring the action as the trustee of an express trust.

3. It follows if the sheriff has a right to maintain the action, that it is by the express authority of some statute (*Code*, §§ 111, 113). The presiding justice in his opinion refers to section 232 of the *Code* as containing this authority. This section after speaking of the manner in which the sheriff shall proceed on the attachment, and directing him to keep the property seized or its proceeds, to answer the judgment which may be obtained in the action, says that he "shall, subject to the direction of the court or judge, collect and receive into his possession all debts, credits and effects of the defendant." But it is plain that this action was not brought to collect a debt, &c., of the defendants in the attachment suit, within the meaning of this provision of the *Code*. The sole purpose of this action is to reach equitable assets, beyond the reach of the attachment and execution in the attachment suit, and yet the claimed legal lien acquired by the attachment is pointed to as the foundation of the sheriff's right to maintain the action. The fact is, the sheriff did not by the service of the attachment on the trust company, attach a debt or credit of Lanes, Boyce & Co., the defendants in the attachment. Though the assignment should be declared fraudulent and void as to their creditors, yet it was and is valid as to them. The relation of debtor and creditor did not exist between the trust company and Lanes, Boyce & Co., when the attachment was served on the trust company.

If the deposit of the moneys by the assignees with the trust company created a debt, it was a debt of or to the assignees. If the sheriff should obtain a judgment in this action setting aside the assignment, and declaring Belmont & Co. equitably entitled to enough of the funds in the hands of the trust company to pay their debt, this judgment would be entirely consistent with the fact that when the attachment was served the trust company was not indebted to Lanes, Boyce & Co., and, therefore, that the

Kelly agt. Lane.

sheriff did not and could not attach any debt of theirs. In granting the relief asked for by virtue of its equity powers, the court would not be required to declare, and never could or would declare otherwise.

It appears to me, therefore, that the reasoning to show the sheriff's right to bring this action by the express authority of section 232 of the Code, not only assumes that when the attachment was served on the trust company, the assignment was void even as between the assignors and assignees, but also that the assignment had been judicially declared void as to Belmont & Co., though they had not then recovered a judgment, and though the very question in this case is as to the authority of the sheriff to bring an action to have the assignment declared void, and that these unauthorized assumptions are not the only defects of the argument; for the relief asked for by the complaint, if granted, would be entirely consistent with the fact that when the attachment was served the trust company was not indebted to Lanes, Boyce & Co., but to their assignees, for or in the amount deposited by the assignees. It is not necessary to question the right of the sheriff to go into a court of equity, if necessary, to collect debts, credits and effects of the defendant in the attachment in fact attached by him.

4. It appears to me that the recent decision of this general term in the case of the *United States Trust Company* agt. *Leroy M. Wiley and others*, that the trust company, under the circumstances, could not maintain a bill of interpleader, is inconsistent with the conclusion arrived at by my associates in the principal case. I think the decision referred to was right.

5. I have never doubted that the sheriff when sued for seizing chattels under an attachment or execution, by a third party claiming under assignment from the defendant in the attachment or execution, might show as a defence, that the assignment was fraudulent and void as to the

Kelly agt. Lane.

plaintiff in the attachment or execution, but does it follow that the sheriff upon or after such seizure, could bring an action in his own name to have the assignment set aside as fraudulent? I think such an action would be an anomaly. An attachment or execution directs the sheriff to seize the goods and chattels of the defendant. He seizes certain chattels as the chattels of the defendant. If made an involuntary defendant for such seizure, it is reasonable that he should be permitted to show for his own protection, if not for the benefit of the attaching or execution creditor, the assignment to be fraudulent, and that as to such creditor the chattels were at the time of the seizure the chattels of the defendant in the attachment or execution, but does it follow that the sheriff could after the seizure, volunteer to bring an action to have the chattels declared the chattels of the defendant in the attachment or execution? The attachment is his authority for making the seizure, at the peril of being able to show in a suit against him, the alleged assignment to be fraudulent and void, but where is his authority for bringing the action to have the assignment declared fraudulent and void?

6. This action by the sheriff, so far as I am informed, is without precedent. It is not a violent presumption that Lanes, Boyce & Co., at the time of their assignment had many creditors besides Belmont & Co., and that other creditors before the attachment was served on the trust company, were in a position to commence and had commenced actions to set aside the assignment as fraudulent, and reach the equitable assets. It is difficult to see any possible motive for serving the attachment on the trust company, and then under color of the claimed legal lien acquired by such service, commencing this action in the name of the sheriff, other than to displace or forestall such prior equities, and gather the fruits which superior diligence had equitably entitled such other creditors to. If this was the motive or purpose, we are not called upon in this case to strain the

Kelly agt. Lane.

law to create a precedent. On the question of the right or power of the sheriff to bring this action, it is sufficient to give force to this suggestion, that there may have been such prior equities. It is not an answer to it to say that the sheriff may have to take the relief asked for in this action, subject to such prior equities. Such qualified right or decree is not consistent with the theory of the sheriff's right to bring the action.

7. If my brethren are right in the conclusion they have come to, and it is established as a rule or principle of law that the sheriff had a right to bring this action in his own name, then sheriffs in addition to their other powers and duties, are the grand trustees, prosecutors or almoners of or for defrauded creditors, and it is their duty to hunt up and ferret out frauds, and bring actions to reach *equitable assets* in their own name, for the benefit of defrauded creditors. I cannot think there is any law clothing sheriffs with any such general administrative official capacity or duty.

8. It is doubtful whether the judgment creditors, Belmont & Co., on the facts stated in the complaint, could have maintained the action. The execution had not been returned when the action was commenced. It cannot be said that the assignment was an obstruction in the way of their execution, for if the assignment had been out of the way their execution could not have reached the funds in the hands of the trust company.

9. The presiding justice in his opinion, remarks more than once I think, that it is conceded the assignment is fraudulent and void as to creditors. I presume nothing more is meant by this than that in examining and deciding the question of the right of the sheriff to bring and maintain the action in his own name, it may or should be conceded that the assignment is fraudulent and void. I am not aware of any concession as to the fraud other than this logical concession. The answers of the defendants who have answered, other than the trust company, put in issue

Person agt. Civer.

the alleged fraud. I am not aware of any concession in fact as to the fraud.

I think the judgment appealed from should be affirmed, with costs.

SUPREME COURT.

HENRY Z. PERSON agt. WILLIAM H. CIVER.

Where it is averred in a *complaint* that the plaintiff owned the property in question, and loaned it to the defendant, and that it had been demanded of him and he had refused to deliver it, and converted it to his own use, these allegations are sufficient to constitute the action one of *tort*, notwithstanding the *agreement* under which the defendant received possession of the property is stated in the complaint.

Where the defendant received property from the plaintiff under an agreement to return it at a certain time or pay to plaintiff a certain sum for its value, and subsequent to the time limited for its return the defendant paid to plaintiff a part of the stipulated value and gave his due bills for the balance, and on the defendant's refusal to return the property on demand of the plaintiff subsequently made:

Held, in an action by the plaintiff for the conversion of the property, that the defendant could not be *arrested* and held to bail. The plaintiff by receiving a part payment and the due bills for the property, had waived his right to insist upon its return by the condition of the agreement, and treated the transaction as a *sale*, and the amount due as a *debt*.

Erie Special Term, November, 1864.

MOTION by defendant to set aside complaint and to be discharged from arrest, &c.

P. G. PARKER, *for plaintiff*.

W. B. MACMASTERS, *for defendant*.

DANIELS, J. The defendant moves to set aside the complaint and the order of arrest in this cause. The summons contains a notice that in case of failure to answer, the plaintiff will apply to the court for relief; and it is insisted the complaint is for the recovery of money only upon contract. But while an agreement is stated in it, the essential

Parson agt. Civer.

elements of the case stated are in tort. It is averred that the plaintiff owned the property in question and loaned it to the defendant; that it had been demanded of him and he had refused to deliver it, and converted it to his own use. These allegations are sufficient to constitute the action one of tort, notwithstanding the statement of the agreement under which the defendant received possession of the property (*Ridder agt. Whitlock*, 12 *How.* 208). It follows therefore, that the complaint is in conformity with the summons, and so much of the motion as seeks to set it aside must be denied.

But as to the residue of the motion, the statement of the contract in the complaint under which the defendant acquired possession of the property, becomes more material. The same statement is repeated in substance in the plaintiff's affidavit used to oppose the motion. The clause now referred to in the affidavit, is in these words: "That afterwards, and in the fall of the year 1854, said defendant applied to deponent for the loan of said engineer's transit until the following spring, promising to return the same then to deponent, or to pay him the value therefor in money; that deponent loaned the said transit to defendant to use upon said terms." The complaint states that the defendant promised to return the property or pay the sum of one hundred and twenty-five dollars as its value. The property was not returned, but in August, 1857, the defendant paid the plaintiff fifty dollars towards its price, and in October, 1863, made and delivered to the plaintiff his due bills for balance of eighty-one dollars. Although the allegation in the complaint and the statement in the affidavit describe this as a loan, it is very plain that such was not the legal character of the transaction. It was more than a mere loan, for the contract contemplated that the defendant should become the owner of the property, if he elected to keep it and pay the price which was agreed upon. The election was with him, and it may be fairly inferred that he availed himself

Person agt. Oliver.

of it when the period arrived for making it, because he did not then return or offer to return the property. And such must have been the understanding of the plaintiff, for he seems to have made no effort to repossess himself of it, but on the other hand accepted a part of the purchase price, as though a sale had in fact been made. *Strong, Justice, in Westcott agt. Thompson* (18 *N. Y. R.* 365), assumes that a transaction of this nature constitutes a sale of the property. And the same doctrine is substantially maintained in *Marsh agt. Wickham*, 14 *John.*, 167; *Moss agt. Sweet*, 3 *Eng. Law and Eq.*, 311, and note on page 313; 4 *Exchequer Rep.*, 339. The plaintiff undoubtedly had a right to insist upon payment of the price at the time when the defendant by the terms of the agreement was entitled to make his election, and had he done so could have maintained an action for the recovery of the possession of the property, or for its value, if payment had not been made, and the property against his consent had been withheld from him. As he did not avail himself of that right, but afterwards treated his demand against the defendant as a debt, receiving part payment of it in 1857, and due bills for the residue in 1863, the condition arising out of the contract that payment should be made when the election under it was exercised, was waived (*Furniss agt. Hone*, 8 *Wend.* 247), and the plaintiff cannot now hold the defendant to bail.

The motion, so far as it includes an application for a discharge of the defendant from arrest must be granted, but without costs, because the defendant in his papers asked for more than he was entitled to claim.

Thompson agt. Yates.

SUPREME COURT.

DAVID THOMPSON, appellant agt. SUSANNAH YATES, respondent.

An owner of a building who has in good faith paid the contractor in full, according to the terms of his contract, for the erection of such building, is not liable to sub-contractors, laborers or persons furnishing materials, who have filed the necessary notices for the purpose of acquiring liens within the time required by the act of 1854, but *after the contractor had been paid in full.*

Albany General Term, September, 1864.

Before PECKHAM, MILLER and INGALLS, Justices.

THIS was an appeal from a judgment rendered in the county court of Rensseler county, in favor of the respondent. On the 18th day of September, 1862, the respondent, Susannah Yates, entered into a contract in writing with one Daniel Smith, by which said Smith agreed to construct a house and furnish the materials therefor for said Yates, at the sum of \$1,700, *to be paid when called for, as the work progressed.* On the 22d of September, 1862, one Thomas Courtney entered into an agreement in writing with said Smith to do the carpenter work and furnish the materials for said house; Courtney acting for Thompson, the appellant. Mrs. Yates made payments from time to time to said Smith, the contractor, as the work progressed, until the 17th of December, 1862, when she paid the contractor Smith the balance claimed to be due upon the contract, and took from him the following receipt:

"Rec'd of Mrs. Yates three hundred and ninety dollars, in full for building house No. 48 Federal street, Troy.

"December 17, 1862.

Daniel Smith."

At the time the receipt was executed, it was claimed by the contractor Smith that the house was completed, and Mrs. Yates acting upon that assumption paid the money. Subsequent to that payment no work was done to the house except the delivery of two pairs of blinds for cellar win-

Thompson agt. Yates.

dows, which were delivered on the 13th of February, 1863. On the 11th day of February, 1863, the appellant Thompson, as sub-contractor, filed in the clerk's office of the county of Rensselaer, a notice for the purpose of creating a mechanic's lien upon the house and lot, to secure the amount claimed by him for such work done and materials furnished, and on the second day of March, 1863, served upon Mrs. Yates a specification with a notice requiring her to appear in the county court of the county of Rensselaer and answer the same within thirty days, as required by the act of 1854. Whereupon a trial was had in said court, which resulted in a dismissal of the proceedings by the court, on the ground that Mrs. Yates had paid the contractor Smith in full before the lien was created, and a judgment was rendered in favor of the respondent for costs, from which judgment this appeal is taken.

R. A. PARMENTER, *for appellant.*

N. DAVENPORT, *for respondent.*

I. The claimant, David Thompson, acquired no lien upon the property in question by filing his notice on the 11th day of February, 1863.

(a) He was not authorized by the act (*Laws of N. Y.* 1854, *chap.* 402; *id.* 1858, *chap.* 204), to create a lien upon buildings erected or repaired, and the lands belonging to same. The only persons authorized by this act to create liens are contractors, sub-contractors, laborers and persons furnishing materials. The claimant in this case was neither. It was claimed for him upon the trial, that Mr. Courtney, the sub-contractor, acted as his agent, and a paper was offered and received in evidence under the objections of defendant to establish such agency, but it was not pretended that such agency, if one in fact existed, was disclosed or known to the defendant, and extremely doubtful that any such disclosure was ever made to the contractor.

Thompson agt. Yates.

That Mr. Courtney acted as principal, and not as agent of the claimant Thompson in this transaction, and was so treated and dealt with by the contractor Smith, was shown conclusively by the written contract entered into by Mr. Courtney and said contractor, and by the testimony of Mr. Courtney that he entered into the contract without any direction from or consultation with the claimant Thompson, and by his receipts given to the defendant for money paid upon the orders of the contractor.

The contract was entered into by Mr. Courtney in his own name as principal, and the power of attorney given by Thompson (a baker, and not engaged in the business of erecting or repairing buildings,) to Mr. Courtney, whether given for the purpose of screening the property and contract profits of Mr. Courtney from the claims of creditors, or for any other purpose, did not operate to extend the pretended agency created by that instrument to this contract, especially when such pretended agency was not disclosed to the defendant, and when it was more than doubtful that it was ever disclosed to the contractor. Furthermore this statute does not recognize principals, agents nor assignees, but the persons who actually supplied the labor or materials. It provides that actions may be brought by assignees, but recognizes no transfers until after the liens are created (§ 6). The power to create a lien is a personal right, conferred exclusively upon the person by whom the labor was performed or materials furnished (*Roberts agt. Fowler*, 3 E. D. Smith, 632).

(b) If the claimant Thompson had a right to create a lien, he did not serve or file his notice within the time required by the act for such purpose. Section two of this act provides that if the labor or materials furnished shall be upon the credit of any contractor, &c., the provisions of the act shall not oblige the owner to pay any greater sum for labor and materials, than the price stipulated by said contract. In this case the labor and materials were

Thompson agt. Yates.

furnished upon the credit of the contractor, and the contractor paid in full, according to the terms of the contract by the owner, this defendant on or before December 17, 1862, while the claimant's notice was not filed until February 11, 1863; the defendant therefore was not liable on the day the notice was filed in any amount to the sub-contractor, laborer, or person furnishing materials, and the claimant acquired no lien by filing his notice.

In the case of *Carman agt. McIncrow* (3 Ker. 72), it was decided by the court of appeals that an owner who had paid the contractor in full according to the terms of the contract, was not liable to a person furnishing materials, although such person had filed the necessary notice for acquiring a lien under the act of 1851, within the time required by the statute, but not until after the owner had paid the contractor in full. The portions of the corresponding sections of the acts of 1851 and 1854, relating to this point are as follows:

Act of 1851, section 1: "But the owner shall not be obliged to pay for or on account of such house, other buildings or appurtenances, in consideration of the liens authorized by this act to be created, any greater sum or amount than the price stipulated and agreed to be paid therefor in and by such contract."

Act of 1854, section 2: "The provisions of this act shall not oblige the owner to pay for or on account of any labor performed or materials furnished for such house, building or appurtenances, any greater sum or amount than the price stipulated and agreed to be paid therefor in and by said contract, except as in the next section provided."

The exceptions referred to in above section 2, and contained in section 3 of the act of 1854, do not apply to the case at bar, because the building in question was a new erection, and not one "altered or repaired."

The case above cited is decisive on this point, and, indeed, of the entire case. This view was taken by the

Thompson agt. Yates.

county judge upon the trial, and the proceeding dismissed without examining or deciding the other points raised by the defendant. But as other points were raised by the defendant on the trial, it may be well to present them to this court. Section 4 of said act provides that the contractor and others, shall within thirty days after performance or completion of work, or final furnishing of materials, serve the notice upon the town clerk, &c. In this case the performance and completion of the work and final furnishing of materials was on and before the 17th day of December, 1862, nearly sixty days before the notice was filed, except the delivery of two pairs of blinds for cellar windows, which was on the 13th of February, 1863, and two days after the notice was filed. If the claimant therefore filed his notice on the 11th day of February, for the purpose of acquiring a lien for the work done and materials furnished prior to that time, he filed it about twenty-eight days too late, but if he filed it on that day for the purpose of acquiring a lien for the entire work and materials furnished, including the cellar blinds, he filed the notice two days too soon (§ 4), no labor or materials having been furnished between the said 17th of December and the said 13th day of February. Mr. Courtney, the sub-contractor, testified that he "finished the job on the 13th of February, 1863, and surrendered it to Adams." If this statement be taken as true, then certainly no lien was acquired by filing the notice on the 11th day of February, 1863.

(c) If the claimant Thompson had a right to create a lien, he did not serve his notice upon or file it with the proper officer for such purpose. He served the notice upon and filed it with the county clerk of Rensselaer county, and not the town clerk, as required by section 4 of the act (*Rafter agt. Sullivan*, 13 *Abbott*, 262).

II. But if the claimant in any way acquired a valid lien upon the property by filing the notice on the 11th day of February, 1863, the lien ceased and became inoperative on

Thompson agt. Yates.

the 11th day of February, 1864 (§ 20), and no act or proceeding on the part of the claimant continued or revived it. This proceeding was commenced within the year, but the commencement of the proceeding did not extend the lien. A lien law passed in 1851 for the city and county of New York, provided that a suit commenced within the year should extend the lien until the recovery of judgment, but there is no such provision in the act of 1854, under which this proceeding was instituted. If the claimant had recovered a judgment within the year, it would not have extended the lien, but the judgment would have become a new lien upon the property, taking the place of the lien acquired by the proceedings under this act.

III. The claimant's lien, if he had one, having expired on the 11th day of February, 1864, nearly two months before this case was tried, and no act or proceeding on his part having operated to extend the lien, he was not at the time of the trial entitled to any judgment.

(a) The statute under which this proceeding was instituted is a special and extraordinary one, made for the benefit of a few persons, and must be construed strictly (*Roberts agt. Fowler*, 3 E. D. Smith, 632). It authorizes a summary proceeding to obtain a judgment and to enforce payment of claims due to contractors and laborers, and declares the courts open at all times for the purpose of facilitating the collection or enforcement of such claims (§ 6), and claimants must take advantage of the facilities afforded them, recover judgments and docket them during the life of their liens, or lose their claims against the property.

(b) This statute authorizes the recovery of a judgment and the docketing thereof within one year after the creation of the lien (§ 20). There is no provision for judgment after the expiration of the year, and that there is none cannot be regarded as a defect, because one year is ample time for a contractor or laborer to collect his claim or to enforce it by judgment and execution. The pro-

Thompson agt. Yates.

ceeding is summary, and the courts open at all times to aid him, and with little diligence he could not fail to obtain his judgment within the year, if entitled to it. No judgment having been recovered or docketed by the claimant in this case on or before the 11th day of February, 1864, he was not at the time of trial entitled to any against the property in question (*Freeman agt. Cram*, 3 *N. Y. R.* 305 and 309).

In the case above referred to, an action was brought by Freeman and Wait, the contractors, for the enforcement of a lien under the lien statute of 1844, and the question raised for the decision of the court of appeals was, whether the claimants had any subsisting lien under that statute, or whether it expired at the end of the year, and it was held by the court that it expired at the end of the year. The corresponding sections of the acts of 1844 and 1854, in relation to the duration of the liens, are as follows:

Act of 1844, section 3: "The lien so created by this act shall take effect from such filing and such service of the said notice, and shall continue in full force for the space of one year thereafter," &c.

Act of 1854, section 20: "Every lien created under the provisions of this act shall continue until the expiration of one year, unless sooner discharged by the court, or some legal act of the claimant in the proceedings," &c.

(c) The claimant at the time of the trial was not entitled to a judgment against the defendant. The statute authorized him to proceed against the property on which he had acquired a lien, but not against the defendant personally, and he had no right, and the court no power to grant him the right to so change the nature of the proceeding as to allow him to recover a personal judgment (*Sinclair agt. Fitch*, 3 *E. D. Smith*, 677).

If the claimant had any claim against the defendant, and that claim still exists, he must proceed in the ordinary way to enforce it. In any view of this case the claimant was not at the time of the trial of this action entitled to a

Thompson agt. Yates.

recovery, and as there was no question of fact for the jury to determine, it was the duty of the court to dismiss the proceedings, and the court having properly performed that duty, the judgment should be affirmed, and a new trial denied.

By the court, INGALLS, J. I think this cause was properly disposed of by the county court, upon the ground assumed by that court. Mrs. Yates contracted solely with the contractor Smith, and by the terms of that contract she was *to pay when called upon as the work progressed*, and did pay from time to time to Smith, or upon his order, and on the 17th of December, 1862, upon the assumption that the work was completed, paid \$390, which was claimed by Smith, and supposed by Mrs. Yates to be the balance due upon the contract, and took a receipt in full. No work was done to the house after that payment save the delivery of two pairs of blinds, which occurred on the 13th of February, 1863. It can hardly be successfully contended that the mere delay of the blinds for a period of about two months, prevented the parties (Yates and Smith) from considering the contract completed. At all events, Mrs. Yates acted upon the assumption that the work was done, and paid her money accordingly, and in the absence of fraud or collusion on her part was entitled to protection, unless Thompson by his vigilance had acquired a valid lien upon the property prior to such payment. She paid pursuant to her contract, and to the only person with whom she had contracted. There was no privity of contract between Thompson and herself. She had never agreed to pay him a dollar, and he could only reach the money in her hands by force of a lien legally created previous to payment by her. It is the misfortune of Thompson that he proceeded with the work without taking the precaution to make Mrs. Yates by agreement liable to him, instead of depending upon Smith for compensation. It is the province of the

Whitney agt. Wells.

court to construe and enforce, but not make contracts for parties. The statute in relation to such liens (*Laos of 1854, p. 1086, § 3*), clearly contemplates the right of the owner to pay the contractor prior to the creation of a lien, provided there is no collusion between the owner and contractor with a view to defraud the sub-contractor. I fail to discover evidence of such collusion, which required the county court to submit that question to a jury, nor was there any other question upon which the jury should have passed. There was no error committed by the county court in the disposition of the cause, and the judgment should be affirmed with costs. As the question considered was the only one passed upon by the court below, I do not deem it advisable to discuss the other questions presented by the respondent.

SUPREME COURT.

THADDEUS WHITNEY agt. WAIT WELLS.

In this case, this court on appeal from a judgment of the county court containing a case and exceptions, in an action originating in a justice's court, *held*, that it could not set aside the verdict and grant a new trial on the ground that the verdict was against evidence—the motion for a new trial on that ground should first be made in the county court, before appealing to this court.

But this court *reversed* the judgment of the county court, and granted a new trial in that court for an *error in the charge of the county judge*.

Broome General Term, November, 1864.

Before CAMPBELL, PARKER, MASON and BALCOM, Justices.

THIS action originated in a justice's court, where the plaintiff recovered a verdict for \$50 damages. The defendant appealed to the Cortland county court, where the plaintiff again recovered a verdict for the same amount of damages. The defendant made a case containing his exceptions taken on the trial in the county court, which were settled and made a part of the judgment roll in that court. He

Overing agt. Russell.

then appealed from the judgment of that court to this court, without first moving for a new trial in the former court. His counsel made the point in this court that the verdict of the jury in the county court was against the evidence. But upon this point the court said: "This court cannot set aside the verdict and grant a new trial on the ground that the verdict is against the evidence. The defendant should have moved for a new trial on that ground in the county court, before appealing to this court."

This court, however, reversed the judgment of the county court, and granted a new trial in that court for an error in the charge of the county judge to the jury.

W. H. WARREN, *for plaintiff.*

STEPHEN KELLOGG, *for defendant.*

SUPREME COURT.

HENRY C. OVERING agt. ROBERT RUSSELL.

Where the circuit judge on the rendition of a verdict of the jury for the defendant, on the same day sets it aside and grants a new trial upon his minutes, on the sole ground that the verdict is *against evidence*, it should be *on payment of costs by the plaintiff*, and not that the costs abide the event.

The rule is well settled, and the Code has not abrogated it, that a verdict should not be set aside on the sole ground that it is against evidence, except on payment of costs by the party against whom it is rendered.

This court on appeal will reverse the decision of a circuit judge setting aside a verdict upon his minutes, on the sole ground that it is against evidence, where they think it is not so decidedly against the weight of evidence as to authorize the judge to set it aside, although if the verdict had been for the other side this court would not have disturbed it upon the evidence.

Sixth District General Term, November, 1864.

Before CAMPBELL, PARKER, MASON and BALCOM, Justices.

ACTION of ejectment for lot number 82, in great lot number 5, in the Hardenburgh patent, Delaware county—tried at the Delaware circuit in August, 1863. The jury rendered

Overing agt. Russell.

a verdict in favor of the defendant. The judge granted a new trial upon his minutes, *costs to abide the event*, on the same day the verdict was received, *on the sole ground that the verdict was against evidence*. The defendant made a case containing the evidence, and thereupon appealed from the decision of the judge granting a new trial, to the general term of this court.

S. H. WHITE, *for plaintiff*.

WILLIAM GLEASON, JR., *for defendant*.

By the court, BALCOM, J. In *Jackson agt. Thurston* (3 Cowen, 342), the court set aside a verdict and granted a new trial, costs to abide the event, on the sole ground that the verdict was against evidence. But on a motion to correct the rule in respect to the costs, the court said: "The jury having decided contrary to evidence, the rule should have been *on payment of costs by the plaintiff*, such is the uniform practice;" and the rule was modified so the verdict was set aside and a new trial granted, *on payment of costs by the plaintiff*, who had been beaten in the action. In *Goodyear agt. Ogden* (4 Hill, 106), COWEN, J., in delivering the opinion of the court, said: "Having disposed of the principal case, a word is due to the profession in respect to a case cited by the defendant's counsel, viz.: *Green agt. Burke* (23 Wend. 490). This has of late been often cited as showing that though a verdict be set aside as against the weight of evidence alone, the costs are to abide the event. The rule is otherwise, and nothing is said upon it in the case cited, one way or the other. Nor is there any color for the suggestion in the marginal note. A verdict wrong in form was received at the circuit, upon which such an entry upon the record as was due to the justice of the case could not be made. On this error, as well as on the weight of evidence, a new trial was granted. The only thing said of costs is in the direction for entering the rule

Overing agt. Russell.

at the end of the case, viz.: 'costs to abide the event.' Where the verdict is set aside purely as against the weight of evidence, unmixed with other reasons, the rule is as laid down by the chief justice in *The Bank of Utica* agt. *Ives* (17 Wend. 501). It must be on payment of costs. *Burke* agt. *Green* involved another point, on which I stated at the outset that a new trial must be granted, and the point is also stated in the head note of the reporter."

In *The Bank of Utica* agt. *Ives* (*supra*), the jury rendered a verdict for the defendant, which the circuit judge set aside and granted a new trial, with costs to abide the event, from which decision the defendant appealed. Nelson, Chief Justice, delivered the opinion of the court. He said: "As the charge, however, was correct, assuming the point to be put to the jury, and there is no exception to the instructions in this respect, the new trial should have been granted by the circuit judge on payment of costs." And the order of the circuit judge was changed, so that the new trial was granted on payment of costs by the plaintiff.

These decisions settled the rule that a verdict should not be set aside on the sole ground that it was against evidence, except on payment of costs by the party against whom it was rendered. The rule was uniformly adhered to until the adoption of the Code of Procedure, and I believe it has generally been adhered to since. (See *Brown* agt. *Bradshaw*, 1 Duer, 199; *Ward* agt. *Woodburn*, 27 Barb. 354.) I know of no case since the Code became in force, in which this rule has been repudiated, and it is not abrogated by the Code itself. That only declares that "the costs of an appeal shall be in the discretion of the court when a new trial shall be ordered" (Code, § 306, sub. 1). And I am of the opinion the courts should not change the rule notwithstanding the difficulty there is in assigning any good reason for making a party pay costs for a new trial, if wrongfully beaten by a jury on the evidence, when the

Overing agt. Russell.

costs may abide the event if he obtains a new trial for any error of the judge, or for a finding by the jury contrary to law. The rule has been settled and uniformly acted upon so long that it ought not to be changed by the courts. If it is wrong the legislature should abrogate it, or establish a different one.

These views lead to the conclusion that the judge in this case should have required the plaintiff to pay costs as a condition of having a new trial, if he was right in holding that the verdict was against evidence, and that he erred in directing that the costs abide the event. But I cannot construe the evidence as the judge did who presided on the trial.

Secord's memory was not good, and two of the Russells contradicted Keirsted. I have grave doubts whether Overing ever executed any lease of the lot to Secord. It seems to me the evidence tends strongly to sustain the conclusion that Secord signed the lease produced at the trial, and that Keirsted took it, with the understanding that Overing was to execute it and then return it or a duplicate to Secord, and that through forgetfulness or for some other cause, the lease was laid aside and never executed by Overing, and never seen again or mentioned until after this action was commenced. No rent of the lot was ever demanded of Secord or the Russells, and Secord executed a deed of his interest in the lot to Russell, which it is probable he would not have done if he had had a lease of it. If he had had a lease of the lot the presumption is he would have assigned that to Russell, instead of giving him a deed. Besides, if any lease had ever been delivered to Secord, the one produced at the trial would have been signed by Overing, as it should have been, if the understanding that Secord should have a lease had been carried out.

My conclusion is that the judge properly submitted the question to the jury whether the lease was ever delivered, but that he erred in holding that the verdict was

Scudder agt. Gori.

against evidence. I think the verdict was not so decidedly against the weight of the evidence as to justify the judge in setting it aside, though I confess if it had been for the plaintiff we would not disturb it upon the evidence. For these reasons I am of the opinion the order setting aside the verdict and granting a new trial, costs to abide the event, should be reversed with costs, and judgment given in favor of the defendant on the verdict, with costs.

Decision accordingly.

NEW YORK SUPERIOR COURT.

JOHN SCUDDER agt. CATHARINE GORI, impleaded, &c.

The costs of an action are to be taxed according to the fee bill existing at the time of the verdict or dismissal of the complaint; and this, notwithstanding proceedings thereon are stayed.

On a motion at special term for a new trial upon a case, costs are to be granted as upon an appeal from a judgment. Construction of section 307 of the Code.

General Term, October, 1864.

Before ROBERTSON, C. J., MONELL and GARVIN, Justices.

THE complaint in this action was dismissed by the judge at the trial on the 22d of May, 1862. The further proceedings were stayed by the order of the justice who tried the cause, until a case could be made and settled, and a motion thereon for a new trial could be made and decided. The motion for a new trial was made at special term, and denied in the May term, 1864. Judgment was thereupon entered against the plaintiff for costs, the costs being taxed under the law existing in May, 1864.

Upon an appeal from the taxation, the justice at special term decided that the costs must be adjusted according to the fee bill as it existed at the time of the dismissal of the complaint (*i. e.* May, 1862), and that the application at

Scaudder agt. Gori.

special term on a case for a new trial was a motion, the costs of which are regulated by section 315 of the Code.

The defendant appeals to the general term.

R. B. ROOSEVELT, *for appellant.*

S. W. JUDSON, *for respondent.*

By the court, MONELL, J. I am constrained to adhere to the case in this court (*Moore agt. Westervelt*, 14 *How. Pr. R.* 279), which holds that the costs must be adjusted according to the Code as it existed at the time of the verdict, as respects all items prior to that date. It is there said that the "recovery," which gives the right to costs, mentioned in the statute, means the "verdict," and not the judgment. This decision was made at general term, in July, 1857, and no amendment of the Code affecting this question has since been made. *Cary agt. Norwood* (5 *Abb. Pr. R.* 219), decided about the same time, holds the same way. Whether these cases were well considered and supported by authority, is not for us to inquire. Uniformity of decision upon questions of this nature, as well as respect for the views of eminent judges comprising a former general term of this court, require that we should regard the decision as binding upon us.

The right to costs being fixed by the verdict (or in this case by the dismissal of the complaint, which in principle is the same thing), the question is not affected by the stay of proceedings. The right to costs had become complete before the stay, and they must be adjusted in accordance with the then existing law.

The fifth subdivision of section 307 of the Code as it stood in 1852 (*then sub. 6*), gave to either party on appeal except to the court of appeals, a prescribed rate of compensation, but declared that its provisions should not apply to appeals from orders. At that time, under section 349, an appeal could be taken from an order granting or

Seudder agt. Gori.

refusing a new trial, but no costs except a motion fee could be given. In 1857, the 307th section was amended by adding to the fifth subdivision "and the same costs shall be allowed in cases ordered to be heard in the first instance at general term." In 1858 the subdivision was further amended, so that the same read "and the same costs shall be allowed on application for judgment upon special verdict, or upon verdict subject to the opinion of the court, as for a new trial on a case made, and in cases where exceptions are ordered to be heard in the first instance at a general term." In 1862 the section was again amended by striking out the word "as," and inserting the word "or," so that it should read "or for a new trial on a case made."

The amendment of 1858 was difficult of construction. The word "as," conveyed no idea of what was intended. Whether on application for judgment upon verdict, subject to the opinion of the court, the same costs were to be awarded as were given on a motion for a new trial on a case, or whether the word "as" was to be construed into, as by subsequent amendment it was changed into "or," it was difficult to determine. The latter liberty was taken by a judge at special term in *Juckett* agt. *Judd* (18 *How. Pr. R.* 385, 393).

My construction of the section as it now stands is, that the legislature intended to give the same costs as are given on an appeal from a judgment in the four cases, viz.: First, an application for judgment upon special verdict; second, upon verdict subject to the opinion of the court; third, upon an application for a new trial on a case made; and fourth, on exceptions ordered to be heard at a general term, without reference to the place where the application is to be made. In two of the four cases, viz.: application for judgment upon a special verdict, and for a new trial on a case, must be made at special term, and cannot be made at general term (*Code*, § 265). The other two, viz.: ver-

Scudder agt. Gori.

dict subject to the opinion of the court, and exceptions, must go to the general term, and cannot be heard at special term (*Id*). When the first two cases are carried to the general term, it can only be by appeal from the judgment upon the special verdict, or from the order granting or refusing a new trial.

Certainly the exception of cases mentioned in section 349, can have no application to motions for judgment upon a special verdict, and unless it was designed to give that class of cases the costs prescribed by section 307, although made at special term, then so much of the amendment was utterly useless. The literal reading of the section is, that the parties shall have the same costs as are allowed on appeal, on an application for a new trial on a case made. As such application must be made at special term, it follows that the costs of an appeal are to be awarded at the special term. If the application for a new trial on a case stood alone in the section, I might be inclined to yield to the opinion that it was simply intended to take those cases out of the exceptions of appeals from orders. But the section includes and places in the same condition, applications for judgment upon special verdict, and it is quite clear that the costs on such motions are the same as on an appeal. If the judge in *Jackett agt. Judd* (*supra*), had not emphatically said that only motion costs were allowable on a motion for a new trial at special term, I could adopt the whole of his subsequent reasoning, as illustrating the view I have taken of the question. But that learned judge did not notice that motions for judgment upon a special verdict, or for a new trial on a case, can only be made at special term, and, therefore, unless it was intended to give these costs at special term, they cannot be given at all. While he admits that it was intended to give the same costs as on an appeal from a judgment in the four cases mentioned, he confines the right to award the costs to the general term, whereas in two of the cases, the motions cannot

People *ex rel.* Lumley agt. Lewis.

be made at general term at all. Neither view is free from difficulty. The section is inartificially drawn, ambiguous, and capable perhaps of either construction, and with other judges I can frankly say I am not entirely satisfied with either. There is as much reason for giving these costs at special term as to confirm the right to them at general term, if the motion could be made there. The motion at special term involves the preparation of the case, and frequently as elaborate and solemn argument as at general term, and it would seem to require a similar compensation.

My conclusion is, that upon a motion for a new trial upon a case made at special term, the parties are entitled to the same costs as upon an appeal from a judgment.

The taxation appealed from must be readjusted upon the principles here stated.

SUPREME COURT.

THE PEOPLE, *ex rel.* JOHN LUMLEY and another agt. MORGAN LEWIS and others, Commissioners of Highways of the town of Cherry Valley.

Where an *alternative writ of mandamus* is granted, a return made thereto, and issues of fact joined thereon, the case becomes an *action* under the Code, and is not a special proceeding.

Costs in actions of *mandamus* are not affected by the fee bills of 1840, or the Code, and are still to be taxed under the fee bill contained in the Revised Statutes.

The rule of *stare decisis* must command some respect both from the bar and the bench.

A county judge has power to tax costs under the old fee bill.

A party desiring a *re-taxation* of costs must move without delay, and the motion must be founded on the papers used before the taxing officer below.

A general objection to every item in a bill of costs as illegal, &c., is not available on motion for re-taxation

*Oneida Special Term, March, 1863, ALLEN Justice, and
Broome General Term, January, 1863.*

People *ex rel.* Lumley *agt.* Lewis.

Before CAMPBELL, PARKER and MASON, Justices.

MOTION for re-taxation of costs. The action was mandamus to compel the defendants to open and work a highway. The defendants made a return to the alternative writ, and the relators pleaded to the return. The issues of fact were tried at the circuit, and a verdict rendered, and judgment ordered for a peremptory writ and costs in favor of the relators. For a full statement of the facts, see report of the case on the merits (26 *How.* 378).

The relators' costs were made up under the fee bill of the Revised Statutes, and were taxed accordingly by the county judge of Otsego county, on the 11th day of April, 1862. On the taxation, the defendants' counsel objected to the authority of the county judge to tax the costs, and also objected that the bill of costs could not be taxed, for the reasons, 1. That said costs were properly taxable under the Code; and 2. That said costs were taxable under the fee bill of 1840, as amended in 1844, which objections were all overruled. The defendants' counsel also objected generally to every item in the bill as improper and illegal, and as improperly charged, but did not specify any item separately as objectionable, or state any objection, or any grounds therefor to any single item in the bill. The bill was taxed at the full amount, \$540.46, and filed on the same day, with the affidavits and papers used on the taxation. Four general terms in the district, and eleven special terms, at either of which this motion might have been made, had elapsed since the taxation.

D. C. BATES, *for motion.*

E. COUNTRYMAN, *contra.*

ALLEN, J. The gross amount of costs allowed was very large, and very likely excessive, but of this I cannot speak, for the reason I have not examined and do not propose to examine the bill in detail. But upon a cursory examina-

People ex rel. Lumley agt. Lewis.

tion I am inclined to think that many items were erroneously allowed, and other items proper upon the theory upon which the costs were taxed, were taxed at too large an amount. But for this the attorney for the defendants is in a measure responsible, for omitting to object in proper form and call the taxing officer's attention to the precise objection, and perhaps if the error of the officer in taxing the items was the only ground of objection, the defendants would be remediless. But the objection to the principle of taxation was taken before the officer, and involves a question of right, and has not been lost or waived by any laches.

The question is one of importance, and is whether the anomaly still exists, that in proceedings by mandamus, the costs are to be taxed under the obnoxious fee bill of 1830, while in every other suit and proceeding a more modern fee bill is to be resorted to, and this notwithstanding the efforts of the legislature to repeal it and substitute one that was thought to be more just and reasonable, to wit: in 1840, 1844 and 1848. It is not a question whether a proceeding by mandamus when it progresses to a return, may or may not be in some sense regarded as "an action" or "a suit," which is more comprehensive than an action, and be so styled. We have to do with a statutory definition and division of legal remedies into "actions" and "special proceedings." An action is declared to be an "ordinary proceeding" in a court of justice by which a party prosecutes, &c.; and a "special proceeding" embraces every other remedy (*Code*, §§ 2, 3). Section 2 is broad enough in terms, when speaking of the purposes and objects for which "an action" may be brought, to embrace and include every legal proceeding. For there can be no legal process or procedure except "for the enforcement of a right, the redress or prevention of a wrong, or the punishment of a public offence." The material and distinctive part of the definition is the words "ordinary proceeding."

People *ex rel.* Lumley agt. Lewis.

This distinguishes an action from an extraordinary or special proceeding, and restricts the term to a procedure which would answer to an ordinary action at law or suit in equity.

Now a mandamus is not an ordinary proceeding. It is known as a high prerogative writ, and it is issued in the exercise of an extraordinary power, and although it is to a certain extent assimilated to an action, it is not made an action. The court grants the writ in the exercise of its general supervisory power, and to prevent a failure of justice, and when there is no other specific legal remedy for a legal right. It is not a writ of right, but is granted in the discretion of the court. The court will not interfere by mandamus when an action will lie, or when there is any other remedy at law (*Tapping on Mandamus*, 20, *et seq.*). Costs, the right to execution, and a writ of error from judgments in mandamus cases, have been from time to time annexed by statute to the proceedings as incidents to them, but such incidents do not affect the character of the jurisdiction or the remedy, and make it an "ordinary proceeding." Judge POTTER, in *People agt. Colborne* (20 *How.* 378), goes no farther than this. He merely regards a mandamus as a "suit," or a "proceeding on mandamus" "an action," within the equity of certain statutes, although he did not regard that conclusion as even necessary for the purpose of determining the question then before him. If proceedings by mandamus were actions, technically or otherwise, costs would follow as of course under statutes giving costs in legal actions generally, but such has not been the case, and special statutes have been required to entitle the prevailing party to costs, and to charge them who should pay them. (*Tapping on Mandamus*, 394; 2 *Revised Statutes*, 587, § 57, 619, §§ 39, 40; *Laws of 1833*, 395, § 6; *People agt. Onondaga C. P.* 10 *Wend.* 598.)

Mandamus proceedings have been regarded as special proceedings as defined by the Code, by courts and judges in several cases. They were incidentally so spoken of by

People ex rel. Lumley agt. Lewis.

HARRIS, Justice, in 12 *How.*, at page 99, and were directly so held in *People agt. Schoonmaker* (19 *Barb.* 657), and see *Crary's Practice*, 305. The act of 1854 (*Laws of 1854*, p. 592,) gives an appeal to the general term from an order, judgment or final determination in special proceedings, and it was held in the case last cited that a judgment or final order in mandamus was within this section, and see *Boyd agt. Bigelow* (14 *How.* 511).

For all the purposes of costs, appeals from decisions in special proceedings are regarded as actions (*Code*, § 318, *as amended in 1862*). By the act of 1854, costs when allowed in special proceedings are to be at the rate allowed for similar services in civil actions (*Act of 1854*, *ch.* 270, § 3). By section 471 of the Code, it is enacted that until otherwise provided by the legislature, the second part of the Code shall not affect proceedings by mandamus or prohibition. This part of the section stands as it was first enacted. The provisions regulating costs on appeal in special proceedings, first found a place in the Code in 1849 (*see* § 318). And the act prescribing the rate of allowance in special proceedings, was first passed in 1854; and if a proceeding by mandamus is as I think it to be, "a special proceeding" under the Code, the act is a legislative provision upon the subject so far as costs are concerned, bringing it within the operation of the second part of the Code, and taking it out of the exception created by section 471.

I am told that this is adverse to the practice in the first and sixth districts. I should regret very much to be found in hostility to the courts in those districts, and had I before me the decision of either court I certainly should follow it; although some were referred to they were not cited, and if they have been reported I have not been so fortunate as to see them, and I am compelled to decide in accordance with my own convictions. The taxation must therefore be set aside, and the costs readjusted and inserted in

People ex rel. Lumley agt. Lewis.

the roll in accordance with the fee bill provided for by the Code, neither party to have costs of this motion.

The relators brought an appeal to the general term.

E. COUNTRYMAN, *for appellant.*

I. Mandamus cases are not special proceedings, within the meaning of *chap. 270, Laws of 1854*. When issues of fact are joined therein, they become *suits* or *actions*, as those terms are used in the law. Judge ALLEN holds that a mandamus case is not an "ordinary proceeding in a court of justice," within section 2 of the Code, and is therefore a *special* proceeding. The word "ordinary," according to WORCESTER means "established," "settled," "accustomed," "common," "usual," "often recurring." It cannot be necessary to cite authorities to show how firmly "established," well "settled," and long "accustomed"—how "common," "usual" and "oft recurring" in practice, is the old remedy of mandamus. *Tapping on Mandamus*, 2, 56, declares the remedy so ancient "that the exact date of its institution cannot with any accuracy be shown," although he claims to have traced it to *magna charta*. An examination of the reports under the various classifications of legal remedies existing before the Code, would show no other mode of legal redress more frequently sought and obtained in the courts. But the true explanation of an "ordinary proceeding" is given in § 245 of the Code, which defines a *judgment* to be "the final determination of the rights of the parties in an *action*." Hence Judge HARRIS held in *The People ex rel. Bender agt. The County Judge of Rensselaer* (13 How. 400), "that any judicial proceeding which if conducted to a termination will result in a judgment, is an action." In this case the litigation has resulted in a judgment. The legislature of 1863, while Judge ALLEN was writing his opinion, solved the question against him. By the amendment of that year to

People ex rel. Lumley agt. Lewis.

section 471 of the Code, it is provided "that in *actions* or proceedings by mandamus, amendments of any mistakes in the process, pleadings or proceedings therein, may be allowed," &c. This was clearly the doctrine also of the Revised Statutes, which provide that whenever the relators plead or demur to the return, "the like proceedings shall be had therein for the determination thereof," as in an "action on the case for a false return," and "as in personal actions," and that a recovery therein "shall be a bar to any *other* action" for making such return (3 R. S. 5th ed. 898, §§ 15, 19). This question was very ably discussed in *People* agt. *Colborne* (20 How. 380, 382), and as Judge ALLEN would seem to entertain a doubt as to the precise conclusion to which Judge POTTER arrived, it had better be stated in his own language, page 382. "I am, therefore, *clear* in my view of its meaning, that the proceeding now in question was an action." In the *Commercial Bank of Albany* agt. *Canal Commissioners* (*Court of Errors*, 10 Wend. 32), Chancellor WALWORTH, referring to the changes effected by 9 Ann, ch. 20, said: "After the passing of the statute of Ann, the proceeding in cases (of mandamus) coming within its provisions assumed the form of *ordinary suits*." Judge ALLEN cites *Tapping*, to show that a mandamus is "a high prerogative writ," and an extraordinary remedy. But *Tapping* was there speaking of the original remedy as it existed at common law, before the recent modifications created by various statutes, and after citing these statutes at length, which are very similar in their provisions to those of New York, he says that "the writ of mandamus is at *this day*, from the period at least of the return, *entirely* assimilated to an action." (*Tapping on Mandamus*, 61, 8; see also 3 Black. Com. 265.) True the writ may be said to be granted in the discretion of the court. But this discretion is not capricious or arbitrary. Legal discretion never means either in civil or criminal law, arbitrary will. In the language of Lord MANSFIELD, "discre-

People *ex rel.* Lumley *agt.* Lewis.

tion when applied to a court of justice, means sound discretion guided by law; it must be governed by rule, not by humor; it must not be arbitrary, vague and fanciful, but legal and regular." The writ will always be awarded as matter of right, upon proper case shown (*see 2 John. Cases, 2d ed. 217, note 4*). The doctrine of prerogative was exploded in *Kendall agt. The United States* (12 *Peters*, 608). Judge THOMPSON in delivering the opinion of the court (*p.* 614), said: "It (mandamus) is a writ, in England issuing out of the king's bench in the name of the king, and is called a prerogative writ, but considered a writ of right." And page 615: "It is an action or suit brought in a court of justice, asserting a right, and is prosecuted according to the forms of judicial proceedings." Judge ALLEN's definition of an "ordinary proceeding," would exclude criminal cases from the class of actions. These cases are clearly not commenced by summons or by *consent*, as prescribed by the Code. And they are only instituted by permission of the grand jury, in the exercise of judicial discretion. Still they are embraced in the definition of actions (*Code*, §§ 2, 3, 4, 5, 6). "There are various modes of commencing an action. In courts of record since the adoption of the Code, it must be by summons, &c. But *other* modes have been and may be prescribed in particular cases" (13 *How.* 400, *supra*). And it was held in that case that proceedings under the general lien law, commenced by a simple notice to the adverse party, which resulted in a judgment, was an action. Judge ALLEN argues that a mandamus case is not an action, because it cannot be resorted to "when there is any other remedy at law." This rule has always applied to all classes of actions. A party having a remedy at law, was bound to resort to the proper action. He could not bring trover or trespass, when the proper action was assumpsit or covenant, and *vice versa*. On the same principle he could not have an action of mandamus, when any other action would afford him

People *ex rel.* Lumley agt. Lewis.

proper relief or compensation. Judge ALLEN concedes that a "suit in equity" is an action. But these "suits" or "cases in chancery," as well as mandamus cases, were originally instituted for precisely similar reasons, to wit: in order "to prevent a failure of justice" from the want of specific and adequate remedies at law. "An ordinary proceeding in a court of justice," may be described as consisting of the following successive steps of procedure: *Process*, by which the party complained of is brought before the court; *pleadings*, by which the nature of the demand and the defence is exhibited to the court by the respective parties; *trial or hearing*, by the court of the case so presented; *judgment or decree*, by which the court awards or denies the remedy sought to be obtained; and *execution*, by which the judgment is actually and specifically enforced. Every other proceeding is extraordinary, summary or special. The Code definition of an action may then be paraphrased as follows: It is any judicial proceeding to enforce or protect a right, to redress or prevent a wrong, or to punish a public offence, which, when instituted, is pursued by the regular procedure or established mode of litigation, as by pleading, trial, judgment, execution, and writ of error or appeal. It is admitted that there is a class of proceedings by mandamus, which are strictly motions, and are summary or special in their nature, to which the statute of 1854 can be properly applied. Previous to 1854, as since, a party had his choice of two courses, either to apply directly on affidavits for a *peremptory* writ, under the usual notice of motion or order to show cause, or for an *alternative* writ, by serving which a regular suit was commenced to obtain the peremptory writ. But in the former case prior to 1854, the questions between the parties "being heard on affidavits merely, no formal judgment was given and the decision was *final*," unless the court *ex gratia* allowed a formal record to be made up for the express purpose of obtaining a writ of error. (*Peo-*

People *ex rel.* Lumley agt. Lewis.

ple agt. *Judges of Rensselaer C. P.* 3 *How.* 165; *People agt. Throop*, 12 *Wend.* 183; *ex parte Jennings*, 6 *Cow.* 518; *Commercial Bank of Albany agt. Canal Commissioners*, 10 *Wend.* 31; *People agt. Cayuga C. P.* 10 *Wend.* 633; *People agt. Supervisors of New York*, 20 *Barb.* 86; *People agt. Beebe*, 1 *Barb.* 379.) The act of 1854 so far modified the old law as to allow an appeal from the order, without directing a formal record or judgment, and where the facts are uncontroverted the summary proceeding is now advisable. But where the facts are disputed, now, as heretofore, an alternative writ must be obtained. Judge ALLEN's misapplication of *People agt. Schoonmaker* (19 *Barb.* 657), is therefore easily explained. That was a motion brought on at special term under an order to show cause, and heard on admitted facts. The order for a peremptory writ was granted in the first instance, and the appeal to the general term was from that order, which was properly entertained. This view is now authoritatively confirmed by legislative enactment, in the amendment of 1863 to § 471 of the Code, wherein mandamus cases are expressly recognized as "actions" and as "proceedings."

II. It is admitted, however, that "a suit and proceeding upon writ of mandamus" (3 *R. S.* 5th ed. 909, § 9), is not included in the class of common law actions, technically so called. "The proceeding is in many respects *sui generis*." BARCULO, Justice in *People agt. Supervisors of Dutchess* (3 *How.* 382). Judge ALLEN was therefore clearly correct in saying that "special statutes have been required to entitle the prevailing party to costs in mandamus, and to charge those who should pay them." (*Tapping on Mandamus*, 394; *Laws of 1833*, 395, § 6; 2 *R. S.* 619, §§ 39, 40; 3 *Id.* 5th ed. 909, § 9; *People agt. Onondaga C. P.* 10 *Wend.* 598.) The authority to grant costs in mandamus is *only* to be found in the act of 1833. (*People agt. Densmore*, 1 *Barb.* 557; *People agt. Supervisors of Dutchess*, 3 *How.* 380.) It follows that whenever costs are given, the amount or the

People ex rel. Lumley agt. Lewis.

items should be such as were directed, intended or contemplated by that act. The fee bill of the Revised Statutes was then in force, and the act of 1833 must have been passed with express reference to that fee bill. According to the rule of construction, whatever is within the spirit and intent is within the statute, even if against the letter. (*White agt. Wager*, 32 Barb. 253; *People agt. Utica Ins. Co.* 15 Johns. 358; *Jackson agt. Collins*, 3 Cow. 89; 14 Mass. 92; 1 *Kent's Com.* 462.) Applying this rule to the construction of the act of 1833, and the acts of 1840 and 1844, it is apparent that the true rule of taxation in mandamus cases is to be found in the Revised Statutes. The fee bill of 1840, as amended in 1844, was clearly designed to be limited to *common law* actions. Chancery cases are expressly excepted, and mandamus cases are not expressly included in the act. The act of 1833 is analogous to the act providing that the costs in surrogates' courts shall be taxed under the common pleas fee bill in the Revised Statutes (*Laws of 1837*, p. 536). That fee bill was repealed or modified by the act of 1840, and the court of common pleas was abolished by the new constitution and the Code. Still it has been repeatedly held that the common pleas fee bill remains in force for the cases provided for in the act of 1837. (*Western agt. Romaine*, 1 Bradford, 37; *Wilcox agt. Smith*, 26 Barb. 316, 330; *Devin agt. Patchin*, 25 How. 5; 26 *New York*, 441, 448.) The case, *In the matter of St. John* (6 Hill, 356), adopts the fee bill in the Revised Statutes. The costs in statutory foreclosures are also taxed under the same fee bill (*Collins agt. Standish*, 6 How. 494). Costs on *appeals* from surrogates' courts are now taxed under the Code by the amendment of 1862 to section 471. And a similar specific amendment is requisite to change the rule in mandamus cases. The costs were taxed under the fee bill of 1830, in two recent and reported cases of mandamus. (*People agt. Ewen*, 8 Abb. 359; *People agt. Colborne*, 20 How. 380.)

People *ex rel.* Lumley agt. Lewis.

III. The county judge had jurisdiction to tax the costs. (2 R. S. 2d ed. 210, §§ 32, 34; *Judiciary Act, Laws of 1847*, ch. 280, § 29, ch. 470, § 27; 3 R. S. 5th ed. 306, § 32.)

IV. The defendants have lost their right to a retaxation by laches. "The motion must be made without delay. After the lapse of *two* terms at which the party might have applied for a re-taxation, the court will not interfere though there be objectionable items in the bill." (1 *Burrill's Practice*, 2d ed. 267; *McLean* agt. *Forward*, 1 *Cow.* 49; *Morris* agt. *Mullett*, 1 *John. Ch.* 44; *Graham's Practice*, 2d ed. 338.) The old rule has been recognized under the Code (*Dresser* agt. *Wickes*, 2 *Abb.* 460).

V. The court will not re-tax the costs on a new state of facts not disclosed to the taxing officer below. (*Webb* agt. *Crosby*, 11 *Paige*, 193; *Emmons* agt. *Cairns*, 11 *Paige*, 380.) A motion for a re-taxation of costs is in the nature of an appeal, and can only be heard upon the papers and proofs used before the clerk. (*Logan* agt. *Thomas*, 11 *How.* 160; *Beattie* agt. *Qua*, 15 *Barb.* 132; 3 *Code Rep.* 24.)

VI. The general objection to every item in the bill of costs as illegal, &c., without selecting any particular item, or assigning any ground or reason therefor, is not available, and the court cannot for that reason order a re-taxation. (*Cuyler* agt. *Coats*, 10 *How.* 141; *People* agt. *Oakes*, 1 *How.* 195; *Lyon* agt. *Wilkes*, 1 *Cow.* 591.) "The moving affidavit should state that the taxation was opposed; that certain items in the bill (mentioning them) were objected to, and that they were taxed by the taxing officer, notwithstanding the objection." (1 *Burrill's Practice*, 2d ed. 471; *Rogers* agt. *Rogers*, 2 *Paige*, 459.) And as to all items provided for in the fee bill, which it is claimed are improperly charged, the affidavit must state the *grounds* of the objections to such items. (*Wilder* agt. *Wheeler*, 1 *How.* 136; 1 *Burrill's Practice*, 2d ed. 471.) Where costs are taxed *ex parte*, and therefore without objection, the decision

People ex rel. Lumley agt. Lewis.

of the taxing officer cannot be reviewed as to any of the items allowed (*Hoffman agt. Skinner*, 5 Paige, 526).

D. C. BATES, for respondents.

I. The costs should be adjusted by the county clerk, under the fee bill provided by the Code of Procedure. Mandamus is a special proceeding as defined by the Code (§§ 1, 2, 3). The *Laws of 1854 chap. 270*, § 3, provides that "in special proceedings, and on appeals therefrom, costs may be allowed in the discretion of the court, and when allowed shall be *at the rate allowed for similar services in civil actions.*" In the case of *The People agt. Schoonmaker* (19 Barb. 657), it was expressly decided that a proceeding by mandamus is a special proceeding under the third section of the Code, and provided for by chapter 270 of the laws of 1854. Justice WRIGHT, who delivered the opinion of the court said, page 658: "The argument is that a mandamus is in the nature of an action, unaffected by the Code of Procedure or its provisions relative to appeals, and is not a special proceeding within the meaning of the act of 1854. We are of the opinion that the law referred to authorizes the appeal." In the matter of the *Extension of the Bowery* (12 How. 99), Justice HARRIS, speaking of section 3 of the Code, said: "These remedies, I suppose, are such as are incident to the powers of a court of general jurisdiction, such as *mandamus*, prohibition, habeas corpus and the like." The act of 1854 is also referred to in *Boyd agt. Bigelow*, 14 How. 511; and *Haviland agt. White*, 7 How. 154. In the laws of 1859, chapter 174, section 3, the legislature in providing for appeals to the court of appeals in these cases, calls them "proceedings upon mandamus." If the law-makers had regarded them as actions, they would have used the word "actions" upon mandamus, instead of the word "proceedings." The laws of 1862, page 862, section 21, show that the legisla-

People *ex rel.* Lumley *agt.* Lewis.

ture must have understood proceedings in mandamus to be included in the terms "special proceedings." *Crary's Practice in Special Proceedings*, 305, says: "When costs are granted (in mandamus cases) they are to be at the rate allowed for similar services in civil actions."

II. If the costs are not to be adjusted under the provisions of the Code by the clerk, then they are improperly taxed under the old fee bill of the Revised Statutes, as the fee bill of the act of 1840 abolishes the fee bill of the Revised Statutes, and expressly provides for proceedings upon mandamus (*Laws of 1840, chap. 386, pp. 327, 328 and 330*). The order made at special term should be affirmed, with costs.

By the court, MASON, J. If any question can be regarded as settled with us in this district, it is that a proceeding upon mandamus, where there has been a return, and the suit has gone to pleadings, and a trial thereon has been had, is not a special proceeding under the Code, but an action. And that the costs in such a suit are to be taxed under the fee bill as contained in the Revised Statutes, has been too often decided with us to be regarded as an open question. The question has been often up in special term, and has been several times before the general term, reaching back through a period of more than a dozen years. The first question we have decided in general term is this very case, and if the latter were to be regarded an open question now, I do not think we could come to any other conclusion. Regarding the question as settled with us, I shall refuse to discuss it. The doctrine of *stare decisis* must command some respect both from the bar and the bench. The order made at special term must be reversed with \$10 costs, and the defendants' motion denied with \$10 costs.

Order accordingly.

White agt. Story.

SUPREME COURT.

FRANCIS C. WHITE agt. WILLIAM W. STORY, administrator,
&c., of MARIA J. BOERUM, deceased.

Both *legal* and *equitable* claims against the estate of a deceased person may be referred under the statute.

Where the plaintiff, a confectioner, in 1859, at the request of a *married woman*, whom he knew to have a separate estate, furnished her with articles for a wedding supper on the occasion of the marriage of her daughter, and subsequently she repeatedly promised to pay the debt out of her separate estate: *Held*, that her estate was not liable for the debt.

Because, 1st. There was no evidence of an *intent* to charge her separate estate stated in the contract.

2d. The consideration for the debt did not go to the *direct benefit* of her separate estate. (SUTHERLAND, J., *dissenting*.)

New York General Term, December, 1864.

Before LEONARD, BARNARD and SUTHERLAND, *Justices*.

APPEAL by defendant from a judgment entered on report of referee in favor of the plaintiff.

ROBINSON & SCRIBNER, *for appellant*.

This case originated under an order of reference entered upon an agreement dated November 4th, 1862 (approved by the surrogate), to refer a matter in controversy arising out of a claim presented to the defendant as administrator of Mrs. Boerum, under the provisions of 2 R. S., 88, section 36.

There were no pleadings, and the claim was for the "amount of a bill as per contract, for wedding party, four hundred and eighty-nine dollars and thirty-seven cents," and interest. The cause was tried before Philo T. Ruggles, Esq., the referee named in the agreement, in the fall of 1863, and early part of 1864, whose report is dated February 18th, 1864, whereby he found in favor of the plaintiff, that in the fall of 1859 the plaintiff, at the request of Mrs. Boerum, furnished, sold and delivered her goods, wares,

White agt. Story.

&c., of the value of four hundred and eighty-nine dollars and thirty-seven cents, for an entertainment given by her on the occasion of the marriage of her daughter; that they were furnished on her personal order, and she repeatedly promised to pay for them out of her separate estate; that she had such separate estate, and plaintiff knew it; that her husband, Jacob B. Boerum, was insolvent at the time, and plaintiff knew it; that the articles were charged by plaintiff to her, and that they were in accordance with her sphere in life. He finds as matter of law, that the plaintiff is entitled to recover against the defendant as administrator, the amount claimed with interest. Upon the report judgment was entered March 11, 1864, for six hundred and sixty-nine dollars and sixty-five cents, from which defendant has appealed to the general term of this court, upon his exceptions to this report filed and served, and also upon his exceptions taken upon the trial and presented in the case; first, to admissions of testimony, and second, to the refusal of the referee to non-suit the plaintiff.

I. The referee erred in allowing the plaintiff to answer the question, "In the furnishing of this supper what acts did Mrs. Boerum do?" He was allowed to give evidence against the administrator, in respect to a transaction had personally between the deceased and the witness. The question propounded has reference to matters as to which he is asked to speak as a witness of them, and to what took place in a transaction between the deceased and the plaintiff (the principal), in reference to her procuring the goods to be furnished by him. It is difficult to imagine how the testimony offered can be otherwise than of a personal transaction between parties assumed to be present, and negotiating together upon the subject of the action.

II. When the testimony on the part of the plaintiff had been concluded, the motion made to dismiss the case or grant a non-suit, ought to have been granted.

White agt. Story.

1. Mrs. Boerum being (in the fall of 1859, when these goods were contracted for) a married woman residing with her husband, had no power to contract a debt which would charge her personally. (*Coon agt. Brook*, 21 Barb. 546; *Bass agt. Bean*, 16 How. 93; *Arnold agt. Ringold*, Id. 158; *Andriot agt. Lawrence*, 33 Barb. 142.)

2. The orders of the wife in the departments of her husband's household, which she has under her control, are to be implied in law and presumed in fact as within her agency, on her husband's behalf, and bind him. In this case the goods were delivered to the husband, and he was present at the entertainment. (*Switzer agt. Valentine*, 4 Duerf. 96; *S. C. 10 How. P. R.* 109; *Freestone agt. Butcher*, 9 Carr. & Payne, 643; *Lane agt. Ironmonger*, 13 Meeson & Wels. 368.) The husband is equally liable, although the goods are charged on the tradesman's books to the wife (*Furlong agt. Hyson*, 35 Maine, 332).

3. The debt was not contracted for the benefit of Mrs. Boerum's separate estate, nor did she create any charge upon it for the payment of the debt. (*Yale agt. Dederer*, 22 N. Y. 450; *Owen agt. Cawley*, 36 Barb. 52; *Ledlie agt. Vroman*, 41 Barb. 109.)

4. A suit against the estate of Mrs. Boerum could only be maintained as an action *in rem*, brought to charge some specific property, and not *in personam*. (*Dickerman agt. Abrahams*, 21 Barb. 551; *Sexton agt. Fleet*, 15 How. P. R. 106; see authorities cited in *Howard's Code*, 3d ed. pp. 146 and 224.)

5. No such remedy could be afforded on a demand at law, referred out of the surrogate's court. Claims of an equitable character are not within the cognizance of that court, nor can claims out of that court be recovered on such a reference, when it is made to appear that they are purely equitable.

III. If the court conclude there is error in the judgment, for any of the reasons stated in the last point, the judg-

White agt. Story.

ment should be reversed, and judgment ordered for the defendant with costs ; but if not, then the judgment should be reversed, and a new trial ordered, with costs to abide the event, for the error suggested in the first point.

JOHN B. STEVENS and A. R. DYETT, *for respondent.*

The evidence in this case, and the referee's findings, show the following facts, which are undisputed : That the claimant, who is a baker and confectioner, furnished to Mrs. Maria J. Boerum, goods, consisting mostly of the necessities of life, to the amount claimed, upon her personal order ; that at the time the goods were furnished, the claimant knew she was a married woman, that she had a separate estate, and that her husband was insolvent, and expressly disavowed any liability as to said bill ; that the bill was charged to Mrs. Boerum in claimant's books, and that she repeatedly acknowledged the debt as her individual debt, and at many times promised to pay the bill out of her separate estate ; that the consideration of the contract, viz : mostly necessities of life, went to her and her children's benefit in the partaking of the same, and in the entertainment of her friends ; that the goods furnished, as to quantity, quality and amount, were in accordance with her sphere in life. The testimony furnishes abundance of affirmative acts of Mrs. Boerum, to evince her intent to charge her separate estate with the debt. The claimant's understanding of the contract, and his intent to so charge her estate, cannot be disputed.

I. The goods furnished being in accordance with her sphere in life, and consisting mostly of the necessities of life, such as bread, meats, &c., and going directly to her and her children's benefit, should be a charge upon her separate estate, even if there was no avowed intent so to charge her separate estate. If the rent of a house occupied by her and her family would be a charge upon her separate estate (*Taylor agt. Glenny*, 22 *How. Pr.* 240), then

White agt. Story.

these necessities of life furnished to her on her own order, to her and her family, are a charge upon her separate estate. The charge grows out of the beneficial nature of the contract to her individually.

Judge LEONARD, in *Taylor* agt. *Glenny* (22 How. 240), holds: "That where a married woman had a lease of premises, the rent to be paid was beneficial to herself, and although she might not be held liable on the covenants of the lease, yet she and her family occupied the premises, and that her separate estate was liable;" not on the ground that she charged her separate estate by agreement, but "that it grows out of the beneficial nature of the contract to her individually," and says: "the consideration of the contract was for her own direct benefit," and quotes *Yale* agt. *Dederer* (22 N. Y.), as authority for such construction. If this is true as to rent due, do not bread, butter, meats, &c., furnished Mrs. Boerum for her and her family, charged to her at the time, promised repeatedly to be paid by her out of her separate estate, admitted to have been incurred by her, go to her own direct benefit?

II. It has always been held, that where a debt has been contracted by a *feme covert*, that this will be *prima facie* evidence of an appointment or appropriation of her separate estate to the payment of the debt (*Vanderheyden* agt. *Mallory*, 1 Comst. 458).

(a) All the early and recent cases both in this country and England, establish the doctrine that where a *feme covert* holds separate property and obtains credit, that the property is held liable without any special appointment. (1 Comst. 458, C. A.; 7 Paige, 7; 7 Id. 112; 22 Wend. 526, and other cases referred to in 1 Comst.)

Ch. J. JEWETT, in delivering the opinion of the court of appeals in above cited case, says: "That as a consequence of the principle established, that a married woman may take and enjoy property to her separate use, the right of disposition and appointment is an incident belonging to

White agt. Story.

such interest and power. She may pledge or incumber her estate when she shows an intention to do so."

III. The separate estate of a married woman would be held liable for her debt, where in the contracting of the debt there was an intention to charge her estate, or where the consideration of the contract goes to her individual benefit.

(a) The intent to charge the separate estate may be expressed in the contract, or inferred from the direct benefit to the estate (22 *How.* 12). And in same case the court also held "that services rendered the wife for the benefit of her estate, though profitless, would be a charge upon her estate."

(b) In *Yale agt. Dederer* (22 *N. Y.* 450), the estate of the married woman was exempted, because in the contract there was no expressed intention to charge the separate estate, neither did the consideration go to her individual benefit, or to the benefit of her estate. In a similar case to *Yale agt. Dederer*, upon a wife's note (*Francis agt. Ross*, 17 *How. Pr.* 561), the note was recovered out of her separate estate, because it was given with the intent to charge it.

(c) Judge HILTON, in *Francis & Becke agt. Ross* (17 *How.* 554), holds: "That the rule in equity still exists which recognizes a married woman's debt and charges it upon her separate estate, not upon the ground that the contracting of it is of itself an appointment or charge, but because when it is contracted on the credit of the separate estate, or for its benefit, or for the benefit of the woman, it is just that the estate should answer it." And his construction of *Yale agt. Dederer*, is the same as Judge LEONARD's, viz.: That there was no evidence of intent to charge the separate estate, or that she received any benefit. And he found against the defendant on the ground that there was some benefit received by Mrs. Ross. The same rule of law and construction of *Yale agt. Dederer*, was held at general term, first district, in *Ledelicy agt. Powers* (39 *Barb.* 555).

White agt. Story.

(d) In this case the intestate promised to pay the debt out of her separate estate, and the referee has found as a fact that she so promised. "There can be no more conclusive evidence of an intent to charge" that estate.

IV. The referee's findings of fact are such as to bring this case wholly within the cases cited, and as the "appellate court cannot interfere with referees' findings of fact, unless clearly against the weight of evidence, or in direct violation of some rule of law," (*Roberts agt. Cohen*, 28 *Barb.* 465; *Davis agt. Allen*, 3 *Comst.* 168; *Murphy agt. Bruce*, 23 *Barb.* 565;) the plaintiff is clearly entitled to judgment.

V. There is nothing in any of the defendant's exceptions at folios 31, 32 and 33. The answers to the questions form the true test whether improper evidence was admitted under exception. Judged by this test no error was committed.

VI. As to the third and fourth objections by the defendant to plaintiff's recovery, we have only to say that if it were true that during the life of Mrs. Boerum, an action like a bill in equity might have been necessary (which we by no means concede, since the passage of the act of March 20, 1860, and April, 1862. Laws of 1860, chapter 90, section 7, and laws of 1862, chapter 172, section 7), after her death no such necessity exists. In every case all the debts of an intestate are liens upon his or her goods, chattels and credits, and the surrogate in all cases enforces these liens by the application of the property to the payment of the debts, and this without distinction between legal and equitable demands.

BARNARD, J. This appeal presents two questions: First. Is the claim made against the administrator one which could be referred under title 3, part 2, chapter 6, section 34, of the Revised Statutes. The statute is very comprehensive, it authorizes the reference to be made of any dis-

White agt. Story.

puted claim against the estate of any deceased person. It does not exclude equitable claims—it does not limit the reference to legal claims. The supreme court, at general term in the second district, have decided in an important case (*Ackerman agt. Congdon, executor, &c., of Ackerman, deceased*) that the power to refer under the statute, covers both legal and equitable claims against a deceased person.

Second. Is the evidence sufficient to sustain the judgment? It is needless to go into a full examination of the American and English cases, on the subject of charging the separate estates of married women. They are very conflicting as to the principles stated, and in the reasoning by which they are supported. The court of appeals have in a late case established that in order to charge the separate estate of a married woman, there must have been an intention to charge the separate estate stated in the contract itself, or the consideration must be one going to the direct benefit of the estate (*Yale agt. Dederer*, 22 N. Y. R. 450.)

The case shows no evidence that the deceased contracted this debt with the intention to charge her separate estate, stated in the contract. The vital fact necessary to charge her separate estate is wanting. Her subsequent promise to pay the debt out of her separate estate, does not supply the defect of proof in the original contract. From the evidence given she was never liable at all. She must have done enough to charge her separate estate at the time of the contraction of the debt and in the contract, or there is no action against her unless the consideration went to the benefit of the estate directly. Does it? Did the furnishing of this supper tend in that direction? It is claimed that because it went directly to her and her children's benefit, it should be charged on her estate. The rule requires a direct benefit to the estate itself.

I think that the evidence is insufficient to charge the defendant's estate, and the judgment should be reversed and a new trial granted, with costs to abide event.

Butler agt. Niles.

Concur, W. H. L.

SUTHERLAND, J. I cannot concur. In my opinion the evidence and the facts found by the referee would have abundantly sustained an action in the life time of Mrs. Boerum, to charge her separate estate with the payment of the debt, and considering the judgment in this case to be payable or collectable only out of such portion of the separate estate of Mrs. Boerum as may be in the hands of the defendant or her administrator, I think the judgment is right and should be affirmed. The rule or principle as to the liability of the separate estates of married women, stated in the within opinion, is in my opinion much too limited.

NEW YORK SUPERIOR COURT.

THOMAS BUTLER, respondent, agt. GEORGE W. NILES, appellant.

A motion may be made at special term to modify a judgment, after final judgment has been entered.

The order modifying such a judgment is not appealable to the general term.

Heard General Term, December, 1864. Decided December 31, 1864.

Before MONCRIEF, GARVIN and McCUNN, Justices.

THIS is an appeal from an order made by Chief Justice ROBERTSON. The facts will appear in the opinion of the court.

A. R. DYETT, *for appellant.*

D. M. PORTER, *for respondent.*

By the court, MONCRIEF, J. On the 9th of November, 1863, after a trial of the issues in this action, a direction and adjudication was made by a justice of this court sitting at a special term without a jury, which, among other things,

Butler agt. Niles.

allowed the plaintiff *five days after notice thereof*, to sign and file a certain stipulation, and "in case the said plaintiff shall decline or refuse to sign and file such stipulation," it was adjudged that the complaint be dismissed, &c. It seems a judgment record in the action was filed the same day. This was irregular; there was not on the 9th November, 1863, a final determination of the rights of the parties to the action, from which on that day an appeal could have been taken to the general term. The adjudication was not final until the expiration of five days after it was announced. In analogy to the old common law practice, the direction was a judgment *nisi*, and to the equity practice which would call the adjudication a decretal *order*, not a *final* decree.

After the expiration of the time given to the plaintiff, and non-compliance with the direction, I am of opinion no further action on the part of the court, or of any judge thereof, was necessary. The defendant became entitled by the very terms of the order to judgment of dismissal. The justice who tried the issues, either had made such a direction on the 9th of November, 1863, as finally to pass upon them, or he had not. If the former, there remained nothing for such justice to do; if the latter, then the proceedings had before him were a mis-trial, and neither he or any other justice could supply the defect, there would necessarily be a new trial. The application to set aside or open the judgment upon the allegation that two judgments had been given, as a ground of irregularity, must have been denied, because the justice before whom the motion was made, and under which the order of 5th August, 1864, was entered, treated the application as if a stay of proceedings had been ordered, and finding proper occasion therefor, "permitted judgment to be entered." *There was no adjudication of the issues* or the action by the learned justice who disposed of the motion under the order of August 5th, 1864.

Butler agt. Niles.

Whether or not upon the merits some relief might and should have been given, depends upon the inquiry, first, whether the court had the power; and, second, if it had, whether the case as presented by the plaintiff warranted its exercise, and what was done was fairly within its limits. The court of appeals in *The New York Ice Company agt. The Northwestern Insurance Company* (23 N. Y. R. 357), said: "It is suggested in the opposing papers that the judgment had become *perfect and final before* the motion was made," and did not see the force of the suggestions. The judgment was perfect as soon as pronounced and entered. It would become final when the time for appealing should expire. * * * It thought the power of the court (below) to modify or amend the judgment *could not be questioned*. Even if the time for appealing had expired, that court was by no means prepared to admit that this power would be lost. At all events, so long as the judgment was subject to an appeal it was subject to such corrections and modifications as the court which *pronounced* it might, in *its discretion, think proper to make*. The administration of justice would be *extremely imperfect if this power did not exist*."

If the power did exist, it is difficult to understand why its exercise should be questioned. The court having passed upon the matters of fact presented, and adjudicated upon their sufficiency, and it appearing that relief has been given to a party whose fault or omission was excusable, and intending to do justice to both parties as directed in the adjudication upon the trial, as the time within which the plaintiff could make and file his stipulation had expired, "justice plainly required," under the circumstances detailed in the papers, that he should be put in the same or a similar situation as at the trial, and as it was not done within the time limited at the time of the trial, "it was just that the omission should be supplied afterwards." Again, following the decision just freely quoted, we are of

Place agt. The Butternuts Woolen and Cotton Manufacturing Co.

opinion that the general term had no right to entertain the appeal at all from the order at special term. "That order in its substance and nature simply allowed" an opportunity for the plaintiff to sign and file his stipulation which he had omitted to do, in furtherance of the justice of the case. "Such orders rest in the discretion of the court which makes them, and they involve no substantial right, and they are not reviewable upon appeal. They do not belong to either class of orders which, according to the Code, may be re-examined at the general term." The learned judge at the trial, could, with the same justice and propriety have given three hundred instead of five days, within which the stipulation should be signed and filed, and hence there was no substantial right of the defendant's overlooked, or injustice done to him, when the time actually allowed having expired, and in the opinion of the court sufficient excuse was given for the omission to comply within such time, a further day was allowed within which justice should be extended to the parties in the action.

The order must be affirmed.

SUPREME COURT.

SARAH PLACE agt. THE BUTTERNUTS WOOLEN AND COTTON
MANUFACTURING COMPANY.

A term fee of \$10 is given by the Code (§ 307) for every term when the cause is necessarily on the calendar and is not tried; but when tried no term fee is allowed, but a trial fee instead thereof.

When the *merits* of a cause are brought up, and the cause is placed on the calendar of the court, and the issues, whether of law or of fact, and whether arising on the pleadings or out of subsequent proceedings, are presented to the court, and by the court judicially examined, there is a *trial* within the meaning of the Code (§ 252).

Otsego Special Term, April, 1864.

MOTION by defendants to strike out costs. The clerk of

¹Place agt. The Butternuts Woolen and Cotton Manufacturing Co.

Otsego county allowed on the adjustment of costs ten dollars term fee for the term at which the cause was argued in the supreme court, general term. Also ten dollars term fees for term at which the cause was argued in the court of appeals, and included the same in the judgment in favor of plaintiff.

J. E. DEWEY, *for the plaintiff.*

BENJ. ESTES, *for the defendants.*

CAMPBELL, J. This cause having been appealed from the county court to the supreme court, and from the supreme court to the court of appeals, a question arose before the clerk on the taxation of the costs as to the term fees. The clerk taxed a term fee of ten dollars for the term of the supreme court at which the cause was heard or tried, and the same fee for the term of the court of appeals at which the cause was heard or tried in that court. Were these fees taxable under subdivision 7, of section 307 of the Code? The subdivision is in these words: "To either party, for every circuit or term not exceeding five circuits, and five special and five general terms at which the cause is necessarily on the calendar and is not tried, or is postponed by order of the court, ten dollars." When, then, may a cause be said to be tried? A trial is said to be the examination of a cause civil or criminal, before a judge who has jurisdiction of it, according to the laws of the land." (1 Just. 124; Jacob's Law Dic. title "Trial.") The definition by Webster is, "in law the examination of a cause in controversy between parties, before a proper tribunal." By the Code, section 252, "a trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact." It is a judicial examination of the issues between the parties. It is claimed that the issues between the parties are only such issues as are specified in sections 248, 249, 250; in other words, such issues as arise directly upon the pleadings. I think

Place agt. The Butternuts Woolen and Cotton Manufacturing Co.

that construction too narrow. In *Mechanics' Banking Association* agt. *Kiersted* (4 *Duer*, at p. 641), Justice Bosworth, speaking for all the justices of that court, said of a motion for a new trial at special term: "Such a motion is an actual hearing and examination of a cause upon the merits, upon the *issues joined in it*. It is substantially a *trial*, as that proceeding is defined by the Code" (§ 252). It was held that in such cases, when there was a motion for a new trial on a case at special term, on the ground that the verdict was against evidence, that the party was entitled to a trial fee. Sections 248, 249, 250, declare how issues may arise on the pleadings, and what they are, but do not state that they are the only issues which may arise in a cause. Whenever there is a ruling by the judge on the admission or rejection of evidence, which is excepted to, then a question of law arises, and as to that the parties may be said to be at issue. So new questions of fact may arise in the progress of a cause, and which do not appear in the pleadings, and upon which the parties are at issue. Then issues of law and of fact which arise in the progress of a cause to its final determination, as well as the issues which arise on the pleadings, undergo a judicial examination. When the merits of the cause is brought up, and the cause is placed on the calendar of the court, and the issues whether of law or of fact, and whether arising on the pleadings or out of subsequent proceedings, are presented to the court, and by the court judicially examined, then there is a *trial*. The cause is argued by counsel, and a fee for such argument is allowed. But the cause is also tried by the court. There is by the court a judicial examination of the issues between the parties, and hence a *trial*. A term fee of ten dollars is given for every term when the cause is necessarily on the calendar and not tried, but when tried then there is no term fee, but trial fee in place thereof. This it seems to me must have been the intention of the legislature, and such is the fair construction of the

New York and New Haven Railroad Co. agt. Schuyler.

sections of the Code. If these views are correct, then the two term fees, that for the term at which the cause was tried at the general term of the supreme court and at court of appeals, should be struck from plaintiff's bill of costs.

There will be no costs on this motion, as the question is new.

NOTE.—From this decision of Justice CAMPBELL, an appeal was brought by plaintiff's attorney to the general term of the sixth district, when the order was affirmed with ten dollars costs, at the November term, 1864.

SUPREME COURT.

THE NEW YORK AND NEW HAVEN RAILROAD COMPANY agt.
ROBERT SCHUYLER, JOHN A. UNDERWOOD, and others.

A judge related by affinity to one of the defendants in an action, within the degrees of affinity which would exclude him as a juror, cannot grant an injunction therein.

Such affinity exists where such judge and defendant have married cousins who are still living, and the parties are united by a subsisting marriage.

An injunction granted in an equity cause by a judge disqualified by reason of affinity to one of the defendants to sit in the cause, will be dissolved on the application of any of the defendants as to the defendant applying, though the interests and claims of the defendants are separate and distinct, but embraced in one action.

New York Special Term, October, 1855.

MOTION to dissolve an injunction. The New York and New Haven railroad company brought this action against Robert Schuyler and numerous defendants, who were alleged to be holders of over-issued stock of the company fraudulently issued by Schuyler. The object of the action was to procure a determination in a single action of the character of the stock held by the different defendants and alleged to be spurious, and their several claims against the company growing out of the alleged fraudulent transfers and certificates, and the acts of the officers and agents of

New York and New Haven Railroad Co. agt. Schuyler.

the company connected therewith, and to have such transfers and certificates declared void and cancelled, and in the meantime to restrain the prosecution of separate suits by the defendants against the company. The cause is reported upon demurrer in the court of appeals, in 17 *N. Y. R.*, 603.

At the commencement of the action an *ex parte* injunction was granted in pursuance of the prayer of the bill, restraining the defendants from prosecuting such suits to compel the transfer of stock to them, or to assert their title to stock, or their claims against the company growing out of such alleged fraudulent transactions.

Messrs. John A. Underwood & Son, and J. Warren Rogers, defendants, moved upon the complaint and injunction order, and upon affidavits, to dissolve the injunction as to them, stating that they were bona fide purchasers of the stock held by them and alleged to be spurious, and also that the judge by whom the injunction order was granted was related by affinity to one of the other defendants; the wives of such judge and defendant being first cousins.

WILLIAM BLISS, *for the defendants moving*,

argued that the motion should be granted; first, on the ground of the insufficiency of the complaint and the bona fide character of these defendants, and, secondly, on the ground of the incompetency of the judge by reason of affinity to make the order. The points taken and authorities cited by him will sufficiently appear by the following points made by him upon the appeal from the order dissolving the injunction.

I. The dissolution of the injunction is proper on the complaint itself, which is insufficient. These defendants also claim to be bona fide purchasers.

II. The injunction should be dissolved on account of the incompetency of the judge by whom the order was made to make the order, on account of his affinity to one of the

New York and New Haven Railroad Co. agt. Schuyler.

defendants. (2 R. S. 275, §§ 2 and 3; 3 Bl. Com. 363; Co. Lit. 157, and note; Mounson agt. West, 1 Leon. 88; Cain agt. Ingham, 7 Cow. 478, and note; Paddock agt. Wells, 2 Barb. Ch. R. 331; Bellows agt. Pearson, 19 J. R. 172; Oakley agt. Aspinwall, 3 Comst. 550.)

1. In the laws for the administration of justice two objects are sought, that justice should be done, and that it should be believed to be done; that it should be pure, and that it should be unsuspected.

2. The law, therefore, requires that judges and jurors should be free from any presumed personal bias, arising from blood or marriage, that they may be alike above exception and above suspicion.

3. "No judge in any court can sit as such in any cause in which he would be excluded from being a juror by reason of consanguinity or affinity to either of the parties" (2 R. S. 275, § 2). Any person within the ninth degree of affinity or consanguinity to either of the parties, is incompetent to sit as a juror in the cause. (3 Bl. Com. 363; 2 Barb. Ch. R. 331.)

4. The husband and wife are one in law, and relation by affinity exists between the husband and one who is connected by marriage with a blood relative of the wife, and in the same degree in which the wives are related by consanguinity. (Markham agt. Lee, cited 1 Leon. 89; Cases in the Year Books, 21 Ed. 4, 2; and 15 H. 7, 9, cited in the same case; Cain agt. Ingham, 7 Cow. 478, and note; Carman agt. Newell, 1 Denio R. 25; Paddock agt. Wells, 2 Barb. Ch. R. 331.) In Markham agt. Lee, that the sheriff and plaintiff had married sisters; in 21 E., 4, 2, that the sheriff had married the cousin of the plaintiff, was held good ground of principal challenge. In 15 H., 7, 9, the challenge was that the defendant and the sheriff's daughter had married brother and sister. In Cain agt. Ingham, the juror's father had married the widow of the defendant's brother. The court assumed that the objection would have been a good

New York and New Haven Railroad Co. agt. Schuyler.

one if the father had been living, but as he was dead, held that there was no *subsisting* affinity. In *Carman* agt. *Newell*, the plaintiff's brother had married the widow of the justice's brother. The court for the like reason, that the widow was dead, and it did not appear that she had left any issue of such marriage, held that there was no *subsisting* affinity at the time of the challenge. In *Paddock* agt. *Wells*, the court lays down the rule as we have stated it.

III. The objection of consanguinity or affinity is not a mere personal privilege which may be waived, but it concerns decorum, public policy and the public interest, and may be made by any party entitled to be heard in the action. (*Edwards* agt. *Russell*, 21 *Wend. R.* 63; *see p.* 64; *Oakley* agt. *Aspinwall*, 3 *Com. R.* 550.) Any party to a suit may always allege any principle of law resting on grounds of public policy and interest, and not intended merely to secure a personal privilege, and may take advantage of such principle. The judge himself of his own mere motion, without the interposition of any party, may and should refuse to sit, if the fact of his disqualification be known to him.

IV. This is a joint action founded upon a supposed common equity against all the defendants. The injunction is joint, based upon that supposed equity. The incompetency of the judge to grant relief upon that alleged common equity against all of the defendants, disqualified him to make this injunction order, by which he decided questions common to all. It is irregular and void, and must be set aside. He cannot sit *in the cause* (2 *R. S.* 275, § 2). The criterion whether he can sit or not, is whether "he would be excluded from being a juror by reason of consanguinity or affinity to *either* of the parties." The case may be compared to a street assessment case, where the objection is constantly allowed.

WM, CURTIS NOYES, *for plaintiff.*

New York and New Haven Railroad Co. agt. Schuyler.

The complaint is sufficient. The affidavit of the defendants does not contain the requisites to the defence of being bona fide purchasers. The statute says "sit" not act, and means hear on the merits, and does not extend to such preliminary proceedings as the granting of orders. All the cases on the other side are of officers summoning jurors. In *Moers agt. White* (6 J. Ch. R. 360), Chancellor KENT sat where his brother was a party. In *matter of Leeffe* (2 Barb. Ch. R. 39), Chancellor WALWORTH sat where his brother as register of the court of chancery was a party. In *Dimes agt. Grand Junction Canal Co.* (3 House of Lords Cases, 759, see pp. 785, 790, 791), Chancellor COTTENHAM was a stockholder in the defendant's company and yet sat. His decision was reversed, and the court heard the appeal directly from the vice chancellor. It was held that the order of the chancellor was not void, but only voidable. The injunction cannot be disregarded (*Cunningham agt. Bulkin*, 8 Cow. R. 178).

Mr. BLISS in reply : The defendants hold certificates of stock signed by the transfer agent of the company, and all the usual evidence of title. It is not necessary that the affidavit of the defendants should contain all the specific allegations of a plea of bona fide purchase of land. It repels all the imputations of the complaint. The cases in our court of chancery cited by the plaintiff, were cases in which the chancellor sat *ex necessitate*, under the constitution, that court being the only path to the court for the correction of errors.

COWLES, J., said, that without considering the other grounds of the motion, the injunction must be dissolved on account of the affinity of the judge who granted the injunction to one of the defendants in the cause.

Injunction dissolved.

Upon the appeal of the plaintiff to the general term of the court, the order dissolving the injunction was affirmed,

Hamilton agt. Van Rensselaer.

but as the court had decided at the same general term on appeal, that the complaint could not be sustained, it became unnecessary to consider the special ground on which the injunction was dissolved on this motion in the court below.

SUPREME COURT.

MARY M. HAMILTON agt. JEREMIAH VAN RENSSELAER.

A *surety*, who guarantees payment "of the interest" on a bond for the payment of money, not containing any agreement to pay interest, is liable for interest after the bond becomes due.

New York General Term, November, 1864.

Before LEONARD, P. J., SUTHERLAND and BARNARD, *Justices.*

By the court, BARNARD, J. I think the defendant liable to pay the interest which has accrued upon the bond after it became by its terms due; he agreed by his written promise to pay "the interest on the within bond." There was no interest upon it when he covenanted to pay. It was then the interest which was to accrue. If the bond had been payable instantly, there would be no question of defendant's liability. Why limit the liability where it had a term of credit contained in the bond? The guaranty makes no such limitation. Would it not be interest if the bond was due? Is it not interest after the bond becomes due? The party has not limited his liability, and the court cannot, if he omits to do it; his interest cannot be inferred or declared from the burden his unrestricted words put upon him. I think the plaintiff entitled to judgment for simple interest only—the principal debtor cannot be made to pay more, and the surety is only to make good his default.

LEONARD and SUTHERLAND, JJ., concurred.

Benjamin agt. Murray.

SUPREME COURT.

JOHN BENJAMIN agt. ROBERT MURRAY, and another.

The 4th and 5th sections of the act of congress, passed March 3, 1863, entitled "An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases," are *unconstitutional and void*.

The President of the United States before the passage of this act had no power of irresponsible arrest at his will, and without process or color of law. This is *arbitrary power*. The President has no arbitrary power and *congress has none to give him*. It has no power to declare his order a defence to those who execute it, if not otherwise legal.

This court has *jurisdiction* in an action for a violation of the plaintiff's right to liberty, unless it is deprived of it by this act of congress. This is solely determined by the validity of the act itself; and it is the duty of the court to decide upon that question when properly brought before it.

It is not enough that this act of congress is sufficient constitutionally to confer jurisdiction upon the United States court. It must also be sufficient to destroy the jurisdiction of the supreme court of this state, before this court is authorized to turn the plaintiff over to the United States court for redress. (*The decision of the court in Jones agt. Seward, 26 How. Pr. R. 433, not concurred in.*)

Brooklyn General Term, January, 1865.

Before LOTT, SCRUGHAM and BARNARD, Justices.

ON the 25th August, 1862, the defendant Murray, who was then United States marshal for the southern district of New York, directed his co-defendant to arrest the plaintiff, which was done in the county of Suffolk, in this state, where the plaintiff resided, and the plaintiff was kept in prison some ten days. For damages for this arrest and imprisonment, the plaintiff has brought his action in this court, naming in his complaint Suffolk county as the place of trial.

The defendants by petition made application to this court, averring therein that on the 10th day of August, 1862, an order was made by the President of the United States, commanding all marshals to arrest and imprison any person who discouraged volunteer enlistments, or who gave aid and comfort to the enemy, or who were guilty of disloyal

Benjamin agt. Murray.

- practices. That they were informed and believe that the plaintiff did discourage volunteer enlistments, and that for that cause, and by virtue of said order of the President, they did arrest and imprison the plaintiff, and not otherwise; and asking this court to make an order transferring
- this action to the circuit court of the United States for the southern district of New York, according to the provisions of section 5, of chapter 81, of laws of 37th congress, passed March 3, 1863. This application was denied at special term, and from this order the defendants appeal.

F. N. BANGS, *for appellants.*

A. J. PARKER, *for respondent.*

By the court, J. F. BARNARD, J. It is not claimed but that the surety offered was and is good and sufficient, and all forms required by the act of congress have been complied with, so that the sole question presented is whether the papers show "a case arising under the laws of the United States," which congress had the power to confer jurisdiction to try originally in the federal courts, and to remove the same from the jurisdiction of the state courts. No provision is made in this act of congress for the removal of the case by the action and order of the state court. The defendant is required to do certain acts, and file in Suffolk county certain papers, and the case is by force of the act of congress removed, and it is made the duty of the state court "to proceed no further in the cause in prosecution." If then the act is constitutional and valid, the action in this court is by the act itself removed without the assistance of this court, and no order is necessary.

But the order was denied on the merits of the application for the affirmative action of this court in the removal of the cause, and if it cannot stand upon the merits, it should be I think reversed, although the application need not have been made. By the 4th section of the act of

Benjamin agt. Murray.

congress above referred to, it is provided that any order of the President of the United States, or under his authority, made at any time during the existence of the present rebellion, shall be a defence in all courts to any action or prosecution, civil or criminal, pending or to be commenced, for any search, seizure, arrest or imprisonment, by virtue of such order. By the 5th section of the above act, the suits pending or to be brought for acts done by order of the President, and when the order is made a defence therein, may be removed to the circuit court for the district of the United States in which the suit is pending in the state court. From these two sections the argument is made that the federal courts have an appellate jurisdiction in the action, if this law of congress is pronounced in this court ineffectual as a defence, and that congress may grant original jurisdiction upon the federal courts wherever they by the constitution can have appellate jurisdiction. There is great weight of authority in favor of both these positions. (*Osborn agt. United States Bank*, 9 *Wheaton*, 738; *Gelston agt. Hoyt*, 3 *Wheaton*, 246; *Ablemen agt. Booth*, 21 *How. U. S. S. C.* 520.)

The act of congress of March, 1863, did not confer upon the federal courts general jurisdiction to try actions for arrest by order of the President. It gave no power to any person to commence an action in such court. It provided for removal from state courts of actions then pending, and even judgments of state courts, and provided that the cause should "proceed therein (in the circuit court of the United States) in the same manner as if it had been brought in said court by original process, the judgment in such case notwithstanding." This cannot be said to confer original jurisdiction upon the circuit court of the United States. It is only a power to receive by force of law such suits as shall be commenced in state courts, without the power to permit a citizen to sue in the circuit court of the United States in the first instance. The order set up as the defence in this

Benjamin agt. Murray.

case is general and not specific; it directs no illegal arrest nor any arrest except of guilty persons, and the act of congress is not intended to cover such an arrest. If it be deemed specific, then I cannot concur in the conclusions arrived at by the court in *Jones agt. Seward* (26 *How. Pr. Rep.* 433). It is there stated that the court "had nothing to do with the validity of the law as a defence to the action. It is sufficient for the state court that the defence involves the construction and effect of a law of congress." This doctrine it seems to me is entirely erroneous. The plaintiff there like the plaintiff here has brought his action for a violation of his right to liberty; they both come before a court of this state which has been established for the trial of such actions. The court has still jurisdiction unless it is deprived of it by this act of congress. This is solely determined by the validity of the act itself. It is not enough that the act is sufficient constitutionally to confer jurisdiction upon the United States court. It must also be sufficient to destroy the jurisdiction of the supreme court of the state of New York. If the act is unconstitutional it is void. It gives no right of arrest. It destroys no accountability for arrests made. It requires no court, it requires no person to obey it. It shields no person who executes it. The President, before this act had no power of irresponsible arrest at his will, and without process or color of law. This is arbitrary power. The President has no arbitrary power. Congress has none to give him. It has no power to declare his order a defence to those who execute it, if not otherwise legal. This surely requires neither argument nor authority. The 4th section is clearly unconstitutional. It was passed over six months after the plaintiff was arrested by the defendants. The 5th section is only constitutional because it requires a judicial construction of the 4th section. If the 4th section is unconstitutional and void, the 5th section is void also. If these two sections are unconstitutional, void, and of no effect,

White agt. Dodds.

must I not say so in this case, rather than send the plaintiff to another tribunal where the learned justices of the United States courts will so declare it. The case is here; a valid law will remove it, a void law will not. After the supreme court of the United States shall have declared this act of congress unconstitutional and void, what will this court do with actions involving it, according to the principle of *Jones agt. Seward*? Will it never again have the jurisdiction to try an action for assault and battery and false imprisonment, so long as it remains unrepealed, where an officer claims protection under it?

I think the order should be affirmed, with \$10 costs.

SUPREME COURT

JAMES WHITE, JR., and JAMES CUSHING agt. JAMES DODDS.

In an action of *replevin* for the wrongful detention of goods sold by the plaintiff to the purchaser (the credit unexpired), the action proceeds in *disaffirmance of the contract* under which the goods were purchased; and the plaintiff is bound to show a justifiable reason for repudiating the contract before he can recover in the action. Such a reason is shown where fraudulent misrepresentations of the purchaser's solvency at the time the purchase was made, are clearly proved.

No distinct act of disaffirmance of such a contract beyond claiming the property, has ever been held to be necessary as against the wrong-doer. But in case any money or property has been received under the contract, the law requires that such money or property must be *restored* before the disaffirmance can become effectual. And this restoration it is not necessary should be made before suit brought; it may be made at the *trial*.

If a person obtains possession of goods by fraud, the act is wrongful and confers no title. No *notice* is necessary to the offender, and no *demand* need be made on him.

As against the *general assignee* of the wrong-doer, who obtains possession of the goods peaceably, by manual delivery from the wrong-doer, although a *demand* of the property before suit brought may be necessary, it is not necessary to accompany or precede that demand by a declaration of disaffirmance of the contract, and that such disaffirmance is on the ground of fraud perpetrated by the assignor in making the original purchase.

There is no *legal obligation* on the true owner of the goods to disclose the source or the particulars of his title. This is as in other cases developed at the trial.

White agt. Dodds.

Albany General Term, September, 1863.

Before GOULD, HOGEBROOM and MILLER, Justices.

MOTION for new trial on exceptions, ordered to be heard in the first instance at the general term.

IRA SHAFER. *for plaintiffs.*

HENRY SMITH, *for defendant.*

HOGEBROOM, J. Being unable to concur in the result to which my brother MILLER has arrived in this case, or in the course of reasoning which led to it, I proceed to state briefly my own views. Several questions present themselves for examination.

1. Was a disaffirmance of the contract in this case necessary to entitle plaintiffs to recover? And if so, in what way must that disaffirmance be made and shown?
2. Was such disaffirmance in fact made, and was it justified by the facts of the case?
3. Was a demand of the goods necessary before bringing suit, and in what form was it necessary to be made?
4. Was such demand in fact made?
5. Were the defendant's objections to evidence properly overruled?
6. Was the charge of the judge exceptionable?

The action as appears from the complaint, is replevin for goods wrongfully detained. The answer is a general denial, and a denial of the wrongful detention. It is obvious from the evidence that the action was founded upon a supposed right to disaffirm for fraud, the contract of sale of the goods made between the plaintiffs and Charles Ferguson, who was afterwards the assignor of the goods to the defendant, under a general assignment for the payment of his debts. As both of the sales from plaintiff to Ferguson, were upon a credit of six months, neither of which had expired before the commencement of the action, and as furthermore, the suit was brought to recover the goods, instead of the price

White agt. Dodds.

of them, it is plain that the plaintiffs in bringing the suit proceeded in disaffirmance of the contract of sale, and were bound to show a justifiable reason for repudiating the contract before they could recover in the action.

This reason was found, as they allege, in the false and fraudulent representations of Ferguson as to his property and pecuniary responsibility, which furnished the inducement to the sale of the goods. The question of fraud was submitted to the jury, and their verdict establishing the existence of it is not impugned. It appears to have been very satisfactorily proved. The plaintiffs sold two bills of goods to Ferguson in the fall of 1860, amounting to nearly \$1,000, upon his representation that his stock of goods was worth some sixteen or seventeen thousand dollars, and that his debts amounted to only six or seven thousand thousand dollars. This was at the time of the sale of the first bill of goods in September, 1860. On the purchase of the second bill on the 9th or 10th of November, 1860, he represented that he was worth as much or more than he was in September, and owed less, and that there was no foundation for the reports unfavorable to his solvency. On the strength of these representations, which were well calculated to inspire confidence, the plaintiffs' agent sold him the goods. I see no plausible ground for the objection to the questions put to him whether he *relied* on these statements of Ferguson in making sale of the goods. They are the ordinary questions put to witnesses in order to show the obtaining of goods by false pretences.

On the 26th of November, 1860, Ferguson as an insolvent debtor made a general assignment of his property to the defendant Dodds, in trust to pay his debts, and the title thus acquired was the only one under which the defendant claimed any right to hold the goods. The inventory attached to the assignment showed assets to the amount of \$17,522.44, and liabilities to the amount of \$28,531.92, a deficit, therefore, of more than \$10,000 to pay debts, and

White agt. Dodds.

an amount of indebtedness exceeding by more than \$20,000 that stated to the agent of the plaintiffs. It presented therefore a very clear case of fraud, and a consequent right to disaffirm the contract.

I apprehend no particular form, nor any form of words is necessary to give effect to the act of disaffirmance. It is an *act* performed by the disaffirming party, and it is effectually performed by asserting or enforcing title to the property previously agreed to be sold. If a person obtains possession of goods by fraud, the act is wrongful and confers no title. No notice is necessary to the offender, and no demand need be made on him. If a trespasser takes your property he acquires no right thereby, and you are not required to disaffirm his possession otherwise than by retaking the property by your own act or by process of law. If a person takes your property by your consent, by contract or by license, he has a lawful possession. If obtained by *license*, his possession may be terminated by the simple act of demand, which ends the lawfulness of his possession. If obtained under the semblance of a contract which is void for fraud, then the consent has been extorted or obtained by deception, and it is no consent. No distinct act of disaffirmance beyond claiming the property has been ever held to be necessary. This is as against the original wrong-doer (*See Roth agt. Palmer*, 27 Barb. 654). There is another principle it is true, which in case any money or property has been received under the contract, requires that before the disaffirmance can become effectual, the money or property thus received must be restored, because a party cannot both repudiate a contract and at the same time insist on retaining its fruits or benefits. This raises the question whether the note received from Ferguson had to be restored before bringing suit, or whether it was sufficient to restore it at the trial, or give a stipulation equivalent to such restoration at the latter period, the note being accidentally absent, followed up by the production

White agt. Dodds.

and cancellation of the note, or its delivery to the clerk for the benefit of the defendant or Ferguson, on the argument at bar, which was done in this case. I think under the adjudged cases the latter course was all sufficient. The maker of the note is effectually protected, and that is enough. The only other object of surrendering it before suit brought would be to make the act of disaffirmance emphatic and unquestionable, and this has been repeatedly held to be well enough accomplished by its production and delivery at the trial. (See *Nichols* agt. *Pinner*, 18 *N. Y. R.* 295, 312; *Nichols* agt. *Michael*, 23 *N. Y. R.* 264, 272, 273; *Fraschieris* agt. *Henriques*, 36 *Barb.* 276; *Roth* agt. *Palmer*, 27 *Barb.* 654, and cases there cited; *Stevens* agt. *Hyde*, 32 *Barb.* 171.)

As against the original wrong-doer then, no form of words declaring the act of disaffirmance is necessary, nor any act of disaffirmance beyond the decisive one of claiming or seizing the property, by the act of the party or the process of the law. Nor, I apprehend, is anything more necessary under this head as against the general assignee of the wrong-doer. I do not speak now of the question of demand of the property, which may be claimed to be necessary, because the property is in possession of a person acquiring such possession peaceably by manual delivery from the wrong-doer, and apparent owner. I do not deem it necessary to discuss this question, because the evidence is full that the property was demanded of the defendant before suit brought. The question is, was it necessary as against such assignee, having no better title than the original wrong-doer, to accompany or precede that demand by a declaration of disaffirmance of the contract, and that such disaffirmance was on the ground of fraud perpetrated by the assignor in making the original purchase. I know of no such rule of law. The assignee is not a purchaser for a valuable consideration. He stands in the shoes of his assignor, with no better title than he, and in no respect

White agt. Dodds.

in any better position. Except it may be that his possession being peacefully and innocently acquired from the apparent owner, may be regarded as so far lawful that a demand should be made of him to deliver it up before he be subjected to an action. It may be convenient that he should be, as he generally is, distinctly apprised that the ground of the demand is the failure of his assignor to acquire title by reason of fraud in the purchase of the goods. But I am not aware of any *legal obligation* resting on the true owner of the goods to disclose the source or the particulars of his title. This is, as in other cases developed at the trial. The possessor of the goods is supposed to know whether his title is good or not, and he complies with the demand of the claimant, or refuses it accordingly. The claimant of the goods stands upon his title, and enforces or relinquishes his demand according to his convictions of the validity of that title.

I am aware that some dicta in the opinion of Justice SMITH, in the case of *Bliss* agt. *Cottle* (32 Barb. 322), tend to support the proposition that in addition to a distinct demand of the property, there must also be an explicit assertion that the claimant's title is founded upon the fact of fraud perpetrated in the purchase of the goods, but there was nothing in the case requiring an adjudication upon that point, nor is it warranted, I think, by anything contained in the elaborate opinion of the same judge in the case of *Stevens* agt. *Hyde* (32 Barb. 171).

Be that as it may, I think there was sufficient evidence *for the consideration of the jury*, whether the ground of plaintiffs' claim to the property, to wit: on account of fraud in the purchase by Ferguson, was not intelligibly communicated by plaintiff's agent to Dodds, the defendant. The case we must assume was properly opened to the jury at the trial, stating that plaintiffs' claim rested on the ground of fraud, vitiating Ferguson's purchase of the goods. Caldwell, the plaintiffs' agent, testified to the pur-

White agt. Dodds.

chase, and the representations made by Ferguson; to his demand of the goods of the defendant in the rooms formerly occupied by Ferguson; to Dodds' refusal to give them up, and to their subsequent replevy by the sheriff; and that the demand was made after the assignment. He further says: "I think I heard of Ferguson's assignment the next day after it was made, and came on within two hours after I heard of it and called on Mr. Dodds. *I asked him how the matter was?* He said he could'nt tell much about it, and *handed me the assignment*, and said that would show me *how the thing stood* better than he could tell. I looked at the assignment. When I demanded goods of Dodds he claimed them as assignee of Ferguson." The plaintiff having read the assignment rested his case on that, and on the evidence of Caldwell. The defendant did not cross-examine the witness as to the details of the conversation with Dodds, nor move for a non-suit on the ground that plaintiffs had not claimed to Dodds to disaffirm on the *ground of fraud*, but on the ground that "no disaffirmance of the sale was proven to have been made by the plaintiffs, or on their behalf." Dodds was not sworn as a witness for the defence, and the only witness sworn was Ferguson, who contradicted Caldwell in some material particulars as to the nature of the interview between them on the purchase of the goods, but said nothing as to what transpired at the time of the demand. Nothing was suggested as to the absence of any evidence showing the grounds of disaffirmance of the contract until after the testimony was closed, and the judge had charged or was about to charge the jury. The fact that this alleged omission in the evidence was not alluded to until it was too late to correct it; that the ground of claim of title to the goods was fully developed by the evidence and could not have been unknown to Dodds; that the plaintiffs claimed title immediately after the assignment, and long before the expiration of the term of credit, which term of credit is presumed to have been known to

White agt. Dodds.

the defendant; that this claim was made to Dodds himself; that Caldwell asked Dodds "how the matter was?" which in the absence of any explanation, is probably a brief way of stating the substance of a conversation between Caldwell and Dodds about the goods, their sale, the terms of sale, the sudden and unlooked for assignment importing insolvency, and the reason of such assignment; the fact that the goods demanded were those "originally sold;" the presentation by Dodds of the assignment, and his declaration virtually that that was the only explanation he could make of the transaction; the demand of the goods notwithstanding such assignment; the refusal to deliver; the absence of any cross-examination, or motion to non-suit on this ground; the apparently studious omission to allude to this point until after the testimony was closed, lead my mind to the conclusion that Dodds well understood the ground of plaintiffs' claim of title to the goods; that it was equally well understood at the trial, and that it would be giving effect to merely captious objections to the evidence to award a new trial upon the ground that the foundation of plaintiffs' alleged title to the property was not fairly disclosed to the defendant, or that he acted in any degree in ignorance of the nature of the plaintiffs' claim when he refused to deliver to them the goods on their demand.

The other points involved are sufficiently discussed in what has been already said, and on the whole case I am of opinion that none of the exceptions are well taken; that a new trial should be denied, and that the plaintiffs should have judgment on the verdict.

GOULD, J. I should *affirm* on the ground that notwithstanding the charge seemed to concede the contrary, a mere demand was all that was required when it was made of the assignee of the fraudulent purchaser.

MILLER, J., *dissented*.

Irving agt. The People.

SUPREME COURT.

WILLIAM IRVING, plaintiff in error agt. THE PEOPLE, defendants in error.

A sentence which is proper for burglary in the second degree, for which crime the prisoner was indicted, tried and convicted, will not be reversed for the reason that the court who pronounced the sentence probably supposed from an indorsement on the indictment that he was convicted of burglary in the first degree.

New York General Term, November, 1864.

Before LEONARD, P. J., SUTHERLAND and BARNARD, Justices.

By the court, SUTHERLAND, J. The difference between this case and Fellingner's is, that Fellingner was sentenced to be imprisoned for life, a sentence authorized for no degree of burglary except burglary in the first degree; whereas Irving was sentenced to be imprisoned for ten years, a sentence authorized for burglary in the second degree. There was a general verdict of guilty—the indictment sufficiently and certainly charged burglary in the second degree, and he was sentenced to imprisonment for a term of years allowed on a conviction for burglary in the second degree. I do not see how Fellingner's case applies.

It may be that the recorder, misled by the indorsement of the indictment in sentencing Irving, thought that he had been convicted of burglary in the first degree, whereas he had been only convicted of burglary in the second degree, but as his sentence was legal and allowable for burglary in the second degree, I see no ground for reversing the judgment. The statement at the foot of the record sent up, that the prisoner was "tried and convicted by a jury duly impaneled and sworn, on an indictment for burglary in the first degree," &c., cannot be true, if the other part of the record is correct, for the record shows that the indictment was not for burglary in the first degree, but was for burglary in the second degree.

Bininger agt. Wattles.

The judgment should be affirmed.

LEONARD, J. I concur in affirming the judgment. I have examined the minutes of the court of sessions. The record shows that the jury rendered a general verdict of "guilty," and nothing is said in the verdict, or in the judgment or sentence of the court, tending to show that there was any verdict, conviction or sentence for burglary in the first degree. The verdict and sentence are, so far as the record shows, for burglary in the second degree, which is the offence charged in the indictment.

NEW YORK COMMON PLEAS.

BININGER agt. WATTLES, and others.

A name which is used to designate an article and denote its quality, is never the subject of a trade mark, as "Old London Dock Gin."

But where the name of the manufacturer is appended to such title, and a style of bottle and label which have a general resemblance of form, symbols and accompaniments to those of the plaintiff, calculated to deceive the public, the plaintiff will be protected by injunction from such violation.

New York Special Term, January, 1865.

MOTION by defendants to dissolve an injunction.

BRADY, J. The plaintiff in this case has no property in the title "Old London Dock Gin." These words do not denote the goods or property, or particular place of business of the plaintiff, but only the nature, kind or quality of the article in which he deals. The plaintiff would not, therefore, be entitled to any protection against the defendant's use of that title merely. They have gone further, however, in their appropriations, and have used not only the name of Bininger, but have also adopted a style of bottle and label which have a general resemblance of form, symbols and accompaniments to those of the plaintiff, and

Bininger agt. Wattles.

are therefore calculated to mislead the public. It follows, however, if there be no title to the designation adopted by the plaintiff, by which his article of gin should be known, that any person of a name similar to his would be also authorized to call his gin Bininger's old London dock gin, and that the plaintiff would be remediless even in that case. The point of departure from strict legal right commences when the defendants employ a label bearing a general resemblance of form, color, words and symbols, calculated to create the impression that their gin was that sold by the plaintiff, and in that way to deceive the public. The authorities to which I have referred, and which I here sub-join, sustain the propositions herein stated. (Wolf agt. *E. Goulard*, 18 How. P. R. 64; *Burgess* agt. *Burgess*, 17 L. & E. Rep. 257; *Amoskeug Manufacturing Co.* agt. *Spectr*, 2 Sand. S. C. R. 599; *Fetridge* agt. *Wells*, 13 How. P. R. 385; *Leighton* agt. *Bolton*, 3 Doff. 293; *Perry* agt. *Treffett*, 6 Beavan, 66; *Merrimack Manufacturing Co.* agt. *Garner*, 4 E. D. Smith's R. 387; *Croft* agt. *Daly*, 7 Beavan, 84; *Corwin* agt. *Daly*, 7 Bosw. 222.) I refrain from expressing any opinion upon the mode in which the defendant procured the right to use the word Bininger, and also from expressing an opinion upon the truthfulness of the plaintiff's designation (Old London Dock Gin), inasmuch as the parties should have the opportunity to furnish such evidence in relation to both of these questions as they may have the power to produce. I am satisfied, nevertheless, that the application to dissolve the injunction should not be granted upon the ground that the defendants have, without authority, imitated the label of the plaintiff in such a way as to deceive the public.

Motion denied with \$10 costs, to abide the event.

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Smith agt. New York Consolidated Stage Co.

NEW YORK COMMON PLEAS.

HUGH SMITH and others agt. THE NEW YORK CONSOLIDATED
STAGE COMPANY, and others.

A person will not be appointed by the court a *receiver* who by his own acts or the position he occupies, stands in any improper relation to the cause.

Nor generally will a person be appointed receiver, if objection be made by either party, where the court has no personal acquaintance with him.

New York Special Term, January, 1865.

APPLICATION by plaintiffs for the settlement of an order and the appointment of a receiver.

CARDOZO, J. The counsel for the plaintiffs having served me with an order quashing and vacating the writ of prohibition granted by the supreme court, requests me to proceed to discharge my duty to settle the order herein. I shall say a few words in regard to the selection of a receiver.

First. As to the names suggested on behalf of the defendants. After having decided that Mr. Chester Lamb had either been guilty of a breach of trust or a clear violation of law, it is not likely that I should immediately confer another trust upon him. Nor is it reasonable to expect me to appoint Mr. Schell. He is a lawyer, and must certainly be presumed to have known that the assignment to him was either a fraud or a violation of an express statute, and having assented to be the assignee under such circumstances, it is unreasonable to ask the court to make him the receiver.

Recorder Hoffman is my personal friend. I have the highest respect and esteem for him, and that respect and esteem prevent my appointing him. The indelicacy of his appointment in this case is so manifest, that I am quite certain his name has not been suggested with his concurrence. Mr. Oliver Charlock I know, from having when at

Meech agt. Loomis.

the Bar argued a case as counsel on his behalf. I believe him to be a gentleman of character and capacity, but my personal acquaintance with him is not sufficient to justify me in appointing him against the objection of the plaintiffs. As to the gentlemen proposed by the plaintiffs, I have only to say that I am not aware that I have any personal acquaintance with either of them, and as they are not assented to by the defendants, they must also be rejected.

It devolves upon me, therefore, to select a receiver myself, and I have concluded to tender the place to John Murphy, Esq., the receiver of taxes. An additional reason for selecting Mr. Murphy is, that I am informed that the supreme court, in a similar suit, has also appointed him.

NEW YORK SUPERIOR COURT.

ALEXANDER MEECH agt. KELLOGG H. LOOMIS.

The release of a defendant from arrest by the consent of the plaintiff's attorney, does not *per se*, operate as a discharge of the order of arrest. And the defendant is thereafter liable to arrest on final process where the judgment warrants it. *It seems* that if the order of arrest had been *vacated*, the defendant could not again be arrested upon final process.

Special Term, July, 1862.

MOTION by defendant to set aside an execution issued against his person.

MONELL, J. After the defendant had been arrested under an order of arrest in this action, and while in the custody of the sheriff, he transferred to the plaintiff's attorney certain articles of personal property, which it was agreed should be held "as security for payment by said defendant of the amount claimed in said suit, and defendant to be released from arrest." Whereupon the defendant was dis-

Meech agt. Loomis.

charged from custody. It is averred in the moving affidavits that *by reason of such consent* the order of arrest became vacated before the entry of judgment. No vacatur of the order by a judge of this court appears to have been made, and the most that can be claimed is that the consent of the plaintiff's attorney, releasing the defendant from arrest, *operated* as a discharge of the order.

Subsequently the plaintiff obtained judgment for the amount claimed in his complaint. The complaint alleged facts showing that the debt had been fraudulently contracted by the defendant, and the judgment so adjudged. Upon a return unsatisfied of an execution against the property of the defendant, an execution against his person was issued, and he was arrested.

A motion is now made to set aside this last execution, on the ground that the defendant having been discharged from arrest upon the order of arrest, cannot be arrested upon an execution issued upon a judgment in the action. Had the order of arrest been *vacated*, it might be a question whether an execution could issue against the person of the defendant. The consent to release the defendant from arrest did not operate as a vacatur or discharge of the order of arrest. At most I think it is to be regarded in the light of a voluntary escape, or like the entry of common bail under the old practice. I do not understand that in such cases under the former practice the defendant could not be arrested upon final process. A discharge, or an escape, voluntary or otherwise, from arrest upon *mesne* process, never precluded a subsequent arrest upon final process.

Had the order of arrest been discharged, it might be as if no order had been granted, and in that case I think an execution against the person could not be issued. The allegation of fraud in the complaint in an action of this kind, would not of itself authorize the execution. The counsel for the moving party has not furnished me with.

Hecker agt. Mayor, &c., of New York.

any citations to authority for his motion, nor can I upon an examination of the books find any. Upon principle I see no reason for setting aside the execution.

The motion must be denied with costs.

SUPREME COURT.

JOHN HECKER agt. THE MAYOR, &c., OF NEW YORK, and others.

An *injunction* should not be granted upon the mere *verification* of the complaint.

Nor upon statements on *information and belief*, without showing the source of information. It is only where the verification of the complaint is *positive* that it will suffice as an *affidavit*.

Under the ordinances of the common council of the city of New York, the whole charge and supervision of *cleaning the streets* of the city, whether by contract or otherwise, is delegated to the *city inspector* and his subordinate officers, to be performed in the mode prescribed by law. He is the general agent of the city, who within the delegated authority is authorized to bind them.

Nor is it only in reference to the cleaning of the streets that such power is conferred upon the city inspector. For various purposes he has authority to employ men to work for the corporation, either by contract or by day's work.

All these varied causes of employment within the general scope of his authority, give him the power to employ men for those purposes, and when so employed they become entitled to claim from the city compensation for the services they may render.

The doctrine of *ratification* applies to municipal corporations as well as to individuals. And where the corporation of the city of New York not only do not deny their liability, but expressly ratify and confirm the acts of the city inspector, and pass resolutions to provide for the payment of the claims of the workmen and laborers employed by him, such claims are valid against the municipal authorities.

The corporation of the city of New York are liable to be sued and to have judgment rendered against them, although no means have been provided by which the liabilities can be discharged.

New York Special Term, January, 1865.

MOTION to dissolve injunction.

JOHN E. DEVELIN, counsel to the corporation, for the motion.

, opposed.

Hecker agt. Mayor, &c., of New York.

INGRAHAM, J. Many of the questions which will be raised in this action are of such a character that they ought not to be finally decided on a preliminary motion to dissolve the injunction, and among them are the questions as to the right of the plaintiff to bring this action, and the remedy which the plaintiff may eventually be entitled to if he should succeed on the trial of the case. Upon those questions I refrain from expressing any opinion, because there are other valid grounds upon which my decision of this motion must rest.

The defendant, the comptroller, is restrained from paying out any public moneys upon any requisition or payroll of the city inspector, for cleaning the streets of the city of New York, the defendant, the counsel, is enjoined from consenting to any judgment against the city for any work done in cleaning the streets, and the comptroller and mayor are restrained from signing warrants for the payment of any moneys therefor, and from paying any judgment. The complaint charges an agreement between the defendants to raise the money by a note, and then to obtain judgment against the city for the claims to be transferred to Palmer, and an entry of the judgment that the comptroller should give a warrant therefor upon the chamberlain. All the other allegations in the complaint are upon mere information and belief, but it is not stated from what source the information was derived, nor is any information presented to the court by which the court can judge whether such information was true or not. This complaint is verified by the plaintiff in the usual manner as to his knowledge, and his belief of the matters stated on information.

There was no other affidavit on which the injunction was issued.

1. I have repeatedly held that an injunction should not be granted upon the mere verification of the complaint. This has always been the rule, and was so before the Code.

Hecker agt. Mayor, &c., of New York.

(*Campbell* agt. *Merwin*, 7 *Paige*, 157; *Christie* agt. *Bogardus*, 1 *Barb. Ch.* 167; see also 9 *Paige*, 305; 2 *Barb. Ch.* 276.) And such rule has been adhered to since the adoption of the Code (*Jewett* agt. *Allen*, 3 *How. Pr.* 129, and various other cases). So also the rule that statements on information and belief are not sufficient without showing the source of information, is sanctioned. (*People* agt. *The Mayor*, 9 *Abb. Pr.* 258; *Fowler* agt. *Bruce*, 7 *Bosw.* 637.) The 220th section of the Code provides that the injunction may be granted upon its appearing satisfactory to the court or judge, by the affidavit of the plaintiff or other person, that sufficient grounds exist therefor, and the complaint is to be produced to show that the plaintiff is entitled to the relief demanded. This does not allow of the ordinary form of verification where the matters are stated on information and belief (*Bostwick* agt. *Elton*, 25 *How.* 362), and it is only where the verification of the complaint is positive that it will suffice as the affidavit.

2. The ordinances of the common council of the city provide for the city inspector's department, and among the duties devolved upon that officer is that of cleaning the public streets (*Corp. Ord. p.* 154). In that ordinance provision is made for a bureau of sanitary inspection and street cleaning. The officer is required to keep correct accounts of the time of the men employed, and of the work done by them, and the expense where not done by contract.

The 37th section, page 161, provides for auditing the bills and accounts for work done under his supervision, requires him to certify such accounts to the city inspector for all such work, and prohibits the comptroller from paying any bills or money for the work of street cleaning, either by contract or otherwise, until audited and approved by the city inspector. A subsequent article provides for the duties of this officer, where a contract is made for cleaning the streets. Under these provisions, it is apparent that the whole charge and supervision of cleaning the

Hecker agt. Mayor, &c., of New York.

streets, whether by contract or otherwise, is delegated to the city inspector and his subordinate officers, to be performed of course in the mode prescribed by law. For that purpose he is the general agent of the city, who within the delegated authority is authorized to bind them. Nor is it only in reference to the cleaning of the streets that such power is conferred upon the city inspector. For various purposes he has authority to employ men to work for the corporation, either by contract or by day's work. All these varied causes of employment, within the general scope of his authority, give him the power to employ men for those purposes, and when so employed they become entitled to claim from the city compensation for the services they may render.

In *Dunning agt. Roberts* (35 Barb. 463), it was said: "In such cases the real question is, not what power was intended to be given to the agent, but what power a third person who dealt with him had a right to infer he possessed, from his own acts and those of his principal." And such acts, although unauthorized in the first instance, may be ratified by the common council. The doctrine of ratification applies to municipal corporations as well as to individuals (*Peterson agt. The Mayor, &c.* 17 N. Y. 449). And in *Brady agt. The Mayor* (20 N. Y. 312), DENIO, J., while holding that a man cannot recover who makes a contract with the city contrary to the provisions of law, notices as distinct from such a case that of one who has *bona fide* performed labor under such a contract, and may recover what such labor is worth.

The alleged payments are to be made to men who claim to have done work for the city under the directions of the city inspector. It may be doubted whether under the provisions in the city charter, and the provisions in the act of 1864, the city inspector has now any authority to employ persons to clean the streets, except by contract, under his general power as city inspector. Either the board of

Hecker agt. Mayor, &c., of New York.

health or the common council might give such directions as would make them liable to pay the parties employed, even if done in a way different from that contemplated by the statute. How far they would be responsible for such acts in violation of the law, it is not necessary for me now to inquire. Under the law as now framed, they might expose themselves to responsibilities which prudent men would not seek unnecessarily to assume. The city inspector, however, still has the control and duty of cleaning the streets in some way as provided by law, which work is done by men under the directions of a public officer in matters within his control, and to do which he is by law particularly charged; those employed by him for such purposes are not, in my judgment, before doing a day's labor, to stop and examine whether the city inspector is acting in exact conformity to the law, or whether the work is going on in the exact form which some statute has prescribed. The law presumes the officer is acting in conformity to his duty, and an employee in the ordinary course of business under the officer, has a right to the same presumption. But admitting there was some doubt as to the correctness of these views, I think such doubt is removed by the fact that the common council ratified the act of the city inspector when they passed the resolution requesting the mayor to sign the note for the payment of the men, and engaging to indemnify the parties to it against any liability or damage to be sustained thereby.

If the corporation of the city of New York resisted the claim of the workmen, and denied the authority of their officer to employ the men to do the work, the question would be very different; but where they not only do not deny their liability, but expressly ratify and confirm the acts of the city inspector, and pass resolutions to provide for the payment of the claims, I can have no doubt of the validity of the claims for the work so done against the municipal authorities. The remedy to prevent such viola-

Hecker agt. Mayor, &c., of New York.

tions of law is entirely different from confiscating the labor of those who have worked or rendered services that have gone to the benefit of the public, and must be sought by proceedings against the officer who violates the law, or the body which authorizes such violation. I am aware of the class of cases where a defence has been attempted upon the ground that no appropriation had been made from which such claims could be paid.

In the case of *Ewen agt. The Mayor, &c.* (5 Abb. 503), a judgment was rendered in favor of the city upon that ground, but such judgment has since been reversed by the general term of the common pleas, and judgment rendered against the city. And in *Darlington agt. The Mayor, &c., in the court of appeals*, it was held by a majority of the court that the city was liable to be sued and to have judgment rendered against them, although no means were provided by which the liabilities could be discharged. In all these cases the corporation were defending the claims, and they do not present the question which arises in this case, whether, when the public authorities have exceeded the bounds which the legislature has prescribed to them, men who have ignorantly worked for the public use under their authority, should be deprived of their pay on account of such violation of the law.

How far the means resorted to for obtaining payment for these notes given to Palmer are consistent with law, I am not prepared to say. It can hardly be contended that the legislature when providing for the payment of judgments recovered against the city during the year, contemplated that such provisions should be used for the purpose of paying for work which they had prohibited from being done except in a particular way. If there are no funds from which the payment could be directly made, it is difficult to find any authority for making such payment in a way that can bear no other name than an evasion of the law.

Levi agt. Dorn.

It is not necessary, however, for me to say more on this subject, since the course adopted by these officers has been ratified by the city, and the payment of the moneys guaranteed by them. I consider this sufficient to entitle the workmen and laborers to payment, and renders the corporation liable to them therefor. For the reasons before stated, I am therefore of the opinion that these claims are valid and should be paid, and that the injunction cannot be sustained.

Motion to dissolve the injunction granted.

SUPREME COURT.

ISAAC LEVI agt. JULIUS DORN, and another.

The *sureties* in an undertaking on appeal from a judgment in an action against them on the undertaking, are *estopped* by the recitals in their undertaking from questioning the correctness of the amount of *costs* in the judgment appealed from.

Brooklyn General Term, January, 1865.

Before LOTT, SCRUGHAM and BARNARD, Justices.

On the 9th December, 1862, there was tried by a jury in the Kings county court, an action upon appeal from a justice, wherein Charles Frohne was plaintiff and appellant, and Isaac Levi was defendant and respondent. The jury on that day rendered a verdict in favor of respondent for \$175.73 and costs. The costs were subsequently adjusted at \$39.04, and on the 13th January, 1863, the judgment was entered in favor of respondent for \$214.50, being entered by mistake for twenty-seven cents less than the true amount, which was \$214.77. The plaintiff Frohne appealed to the general term from this judgment, and it was subsequently affirmed. Upon his appeal and to stay proceedings, he caused to be executed by defendants and filed an under-

Solomon agt. Solomon.

taking, reciting in it that the judgment was recovered on the 18th December, 1862, in the Kings county court, by Levi respondent, against Frohue appellant, for \$214.77. This undertaking was filed on the 8th January, 1863.

H. C. CLOSE, *for appellant.*

GEO. THOMPSON, *for respondent.*

By the court, J. F. BARNARD, J. The sureties to the undertaking now claim two errors to discharge them. 1. The judgment is recited as being twenty-seven cents more than the amount for which it is entered; and, 2. That the judgment was not in fact entered until after the undertaking was filed.

The first of these objections is not in fact true, the verdict is given, and the costs as taxed are given; the footing up of the two sums is only erroneous, but the defendants are estopped by their recitals in the undertaking. They executed, acknowledged and filed this paper to stay proceedings on appeal. The verdict had been rendered and the costs taxed. They put in the recitals. They are bound by their paper as they made it. (*Decker agt. Judson*, 16 N. Y. R. 439; 22 How. Pr. R. 494.)

NEW YORK SUPERIOR COURT.

HANNAH SOLOMON agt. DAVID SOLOMON.

To entitle the plaintiff to *alimony and counsel fees*, in an action for divorce for cruel and inhuman treatment, she must make it appear that she has been injured, and present a meritorious cause of action.

A *single instance of cruelty* is not sufficient cause to authorize the court to interfere, although vague charges of cruel treatment are also made against the husband. The parties to a marriage contract should bear long and patiently with each other; they should exercise the most forgiving spirit, and seek by all possible means to reconcile their differences, before resorting either to the protection or the power of the law to redress their wrongs. They should become fully satisfied that there was no longer any possibility that the duties of their married life can be discharged.

Solomon agt. Solomon.

Special Term, February, 1863.

THE motion is for alimony and counsel fee to the plaintiff, in an action for a limited divorce.

MONELL, J. It is not a matter of course to allow temporary alimony and an advance to her counsel, in an action by the wife for a limited divorce (*Worden agt. Worden*, 3 *Edw.* 387). There must appear to be an injury, and a meritorious cause of action (*Id.*).

Separations which may be adjudged for cruel and inhuman treatment of the wife by the husband, must be founded upon something more than mere austerity of temper, severity of language, or occasional ebullitions of passion (*Mason agt. Mason*, 1 *Edw.* 278). To constitute the *savitia* of the civil law, bodily injury or an act of personal violence is not necessary. It is made out by a *series* of unkind treatment, accompanied by words of menace, creating a reasonable apprehension that bodily injury may result. The causes of apprehension must be weighty, and show an impossibility that the duties of the married life can be discharged (2 *Kent's Com.* 126).

The plaintiff in her affidavit, with the exception of general and vague charges of cruel treatment by her husband, states but a single act. She says that while sitting in her chair, holding her youngest child in her lap, the defendant suddenly pulled from under her the chair upon which she was sitting, causing her to fall with great violence upon the floor; that he also at the same time attempted to break her hand by holding and squeezing it, and that while she was lying upon the floor he kicked her several times with his foot. For this assault, it seems he was arrested upon her complaint, and was required to give security to keep the peace.

Throwing out of view her general statements of cruel treatment, which are entirely unsupported by any act or fact, we have a single instance of cruelty, or which if the

Solomon agt. Solomon.

defendant's affidavit is true (and it is entitled to the same credence as the plaintiff's), may hardly be denominated a cruelty, upon which the plaintiff seeks a judicial separation from her husband. It does not seem to me that this is sufficient cause to authorize the court to interfere. It was but a single instance of apparently harsh and unkind treatment, which, if as the plaintiff states it, should receive the reprobation of every just person. It was, however, an act which might be forgiven, and which if not repeated, should be forgiven. The parties to so solemn and sacred a contract as that of marriage, should bear long and patiently with each other; they should exercise the most forgiving spirit, and seek by all possible means to reconcile their differences, before resorting either to the protection or to the power of the law to redress their wrongs. They should become fully satisfied that there was no longer any possibility that the duties of their married life can be discharged. The case which the plaintiff may be able to establish on the trial of this action, does not necessarily appear from the affidavits read on this motion. She may prove enough to entitle her to the relief she demands. But she has failed to satisfy me that she has a meritorious cause of action, and upon the papers before me I must deny her motion. I do this with less reluctance, inasmuch as in this court she can have a very speedy trial, when she can have an opportunity, if she shall be able to satisfy the court that she is entitled to its protection and aid.

Higenbotham agt. Lowenbein.

NEW YORK SUPERIOR COURT.

WILLIAM HIGENBOTHAM agt. ABRAHAM LOWENBEIN.

Where a tenant holding over, is liable to be *dispossessed* by virtue of a warrant regularly issued against him by an *incoming tenant*, the latter is not liable for assisting at the request of the constable, to remove the goods in a careful and proper manner, although the day may be *rainy*, and the goods are put out in the rain, and as alleged, suffered injury.

A *warrant of dispossession* properly and regularly issued, protects all who act under it, unless they act *wilfully and maliciously*. And the law does not recognise the *state of the weather* in executing such a warrant.

New York General Term, November, 1864.

Before ROBERTSON, Ch. J., MONELL and McCUNN, Justices.

THIS is an action for injury to personal property, and also for the conversion of property. Damages were laid by plaintiff at \$5,000.

CHAUNCEY SHAFER, *for respondent*.

HENRY MORRISON, *for appellant*.

By the court, McCUNN, J. It appears from the pleadings and by the evidence in the case, that the plaintiff as tenant, occupied certain premises known as No. 241, Bowery, in the city of New York, and that on the first of May, 1856, he held over after the expiration of his lease. The defendant, the incoming tenant, under a new lease and by virtue of the statute giving him the right, took legal steps to evict the plaintiff, and procured the proper warrant for that purpose, and under such warrant plaintiff was removed from the premises. The plaintiff claimed and endeavored to give evidence at the trial, that in the removal of his goods under the warrant, the defendant, rendered himself liable for injury to the plaintiff's property, either through negligence or malice. Plaintiff further claimed, that in addition to his loss for such injury to his goods, the defendant prevented him from removing and taking away a temporary workshop,

Higenbotham agt. Lowenbein.

which he (plaintiff) had erected on the premises at his own expense, worth at least \$300, thereby converting the same to his own use.

The defendant set up in his answer, and endeavored to prove on the trial that the shop belonged to the realty, and that consequently plaintiff had no right to remove the same, and that in removing the goods from the premises under the warrant to dispossess, he (the defendant) acted under color of law, and that the property was not injured by such removal. As to the question of the shop belonging to the realty, very serious doubts arise in my mind in examining that question, but I am relieved, however, from this responsibility, by reason of a portion of the charge of the learned justice who presided at the trial, in which I think he was in error; this being so, I pass this question and other questions arising in the case, and proceed at once to that portion of the charge in which I think there is a clear mistake made as to the law.

It would seem to be conceded by both parties, because I find no objection taken at the trial, that the proceeding had before the justice, and the warrant issued thereunder to dispossess the plaintiff from the premises, was regular in all respects, and was in strict accordance with the statute, and that the plaintiff in this suit was liable to be dispossessed by virtue of said warrant against him. This being so, did the defendant, acting at the request of the constable, render himself liable in assisting to remove the goods in a careful and proper manner? Clearly not. The warrant protected all, unless the defendant acted maliciously and wilfully, and of this there is no evidence.

The learned justice made use of the following language in a portion of his charge: "One of the witnesses, the plaintiff I believe, testifies that the day on which the property was removed was a rainy, bad day; that it rained all day, and the property was put out in the storm, and necessarily suffered injury in consequence of that. If that

Higenbotham agt. Lowenbein.

is so—if the property was removed at an improper time, so that for that reason such removal would cause great injury to the owner, it was an unlawful act. It was contrary to the great rule of law, which commands us to do to others as we would be done by. The constable is commanded by the warrant to be sure to ‘immediately’ remove certain property from the premises; but it is common sense as well as good law, that he is not bound to remove property which would be destroyed by a storm, in the midst of a tempest. It is not doing as we would be done by; it is not right, and therefore not justified by law.” * * *

That the use of this humane language by the justice, I have no doubt had a powerful effect upon the jury, and to a very great degree influenced their minds in arriving at a conclusion as to what their verdict should be, and although such advice would have been most kindly intended to Lowenbein, the defendant, to desist from the execution of the warrant on that rainy day, and wait until the clouds would pass away and sunshine again break forth, yet I am constrained not to recognize this theory as sound law. To give encouragement to such a principle, would in the end embarrass the entire proceedings of our courts, and tend in a very great measure to defeat the aim and object of the law. The law does not, in this sense recognize the state of the weather, and it is for these reasons, without entering more fully into the case, that I find myself compelled to adopt the opinion that the judgment in this case should be reversed and a new trial ordered, with costs to abide the event.

Chief Justice ROBERTSON and Justice MONELL concurred.

Fullerton agt. Viall.

SUPREME COURT.

HIRAM FULLERTON and others agt. VIALI AND GRANT.

By section 307 of the Code the *term fees* (\$10) of causes noticed and put upon the calendar of the court of appeals for argument, are limited to five terms.*

*Warren General Term, July, 1858.**Before ALLEN, JAMES, ROSEKRANS and POTTER, Justices.*

THE defendants in this case appealed to the court of appeals, where the judgment was affirmed June, 1858. The cause was regularly on the calendar eight terms in the court of appeals, before it was reached. 1858, June 26th, costs were adjusted by the clerk of Saratoga county, and he allowed \$80 for the eight terms in the court of appeals. The defendants' attorneys objected to the allowance of over five term fees in the court of appeals, and from the clerk's decision appealed to this court, where it was ordered to be heard at the general term in the first instance. The ques-

NOTE.—This decision is adverse to *Adams agt. Perkins* (25 How. Pr. R. 368), sixth district, April, 1863, opinion by PARKER, J.; and to *Shaw agt. Dwight* (17 Abb. 18), first district, December, 1863, opinions by SUTHERLAND and LEONARD, JJ.; also to *Glentworth agt. Mount* (17 Abb. 15), New York superior court, general term, February, 1863, opinion by BOSWORTH, Ch. J. It will be seen that this decision in the fourth district was made in July, 1858, very soon after the amendment of the 7th subdivision of section 307, and evidently without very particular consideration, as there is no written opinion given—looking perhaps at the justice and right of the question, more than at the strict wording of the statute. While on the other hand the three cases referred to as adverse seem to have been well considered, and the reasoning of the judges upon the point unanswerable. Notwithstanding, we have no hesitation in asserting our belief that it was never intended by the legislature, in the amendment referred to, to allow any more term fees in the court of appeals than in the other courts specified. Why? Because, for the very obvious reason that the calendars of the court of appeals are so large—some 11, 12 or 1300 causes, that in the two, three or four years which it takes to reach an ordinary cause in its regular order in that court, the necessary term fees will reach much beyond those of the other courts, even were there no limit to the term fees in the latter courts. But we presume the judges will be compelled to say in construing this section of the Code, as they are often obliged to declare in construing other statutes—"it is the business of the legislature alone to enact statute laws, and ours to construe them as best we can." R.R.

Carpenter agt. Willett.

tion was argued at the general term in Warren county, before all the judges, in July, 1858.

W. A. BEACH, *for defendants,*

contended that subdivision 7, of section 307, limited the term fees in the court of appeals to five terms.

E. F. BULLARD, *for plaintiff,*

insisted that the limitation only applied to special and general terms of the supreme court, and was not intended to limit the term fees in the court of appeals.

The Court decided that the limit of five terms was applicable to the court of appeals, and therefore struck out \$30 from the amount allowed by the clerk for such term fees, and reduced the allowance to \$50 for five terms.

COURT OF APPEALS.

JAMES S. CARPENTER agt. JAMES S. WILLETT, administrator of JAMES C. WILLETT, sheriff, &c., deceased.

If *process*, by virtue of which a defendant is arrested and imprisoned is *void*, an action against the sheriff for his *escape* cannot be supported.

Justices of the *district courts* in the city of New York have no authority to issue *execution against the person*, upon being satisfied by evidence *after judgment*, and *ex parte*, that the case is one for the *arrest and imprisonment* of the defendant. An execution issued in such a manner is *void*.

A justice in these courts must *adjudge* that the case is one in which the party is *subject to arrest*, and the *right to arrest must be stated in the judgment*, and form a part thereof. This is a part of his judicial labor and duty. It is a limitation of jurisdiction, and not a statutory direction to the officers of the court. *After judgment* the justice has no jurisdiction; he is *functus officio*.

Neither have the district courts any power to *amend their judgments*. They can do nothing requiring the exercise of *discretion*. Having rendered judgment, they are from that time mere ministerial officers.

Argued September, 1864. Decided December, 1864.

Carpenter agt. Willett.

APPEAL from the judgment of the superior court of the city of New York.

JOHN K. PORTER, *for appellant.*

A. J. VANDERPOEL, *for respondent.*

WRIGHT, J. If the process by virtue of which Doughty was arrested and imprisoned was void, an action for his escape could not be supported. That the process is void is a defence to the sheriff, upon the principle that having no right to detain the defendant, the creditor has lost nothing by the escape. (*Phelps agt. Barton*, 13 *Wend. R.* 68; *Horton agt. Hendershot*, 1 *Hill*, 118; *Abner agt. Ward*, 8 *Mass. R.* 79; *Constant agt. Chapman*, 2 *Queen's Bench R.* 771.)

The question therefore is, was the execution by which Doughty was taken issued with or without authority? If unauthorized, then the plaintiff cannot complain that the officer suffered one unlawfully detained to escape. The execution for which he was arrested and committed to the custody of the defendant as sheriff of New York, issued out of the third district court of the city. On the 15th September, 1857, the plaintiff as assignee of one Thomas France, brought a suit against Doughty, in the district court. After successive adjournments the case was tried, and on the 12th of November, 1857, the justice rendered judgment against the defendant for \$250 damages, and \$17.50 costs, and the same was entered in the docket.

It was not stated in this judgment that the defendant was subject to arrest and imprisonment therein. The day following the rendition of the judgment, the plaintiff made affidavit "that judgment has been rendered for the plaintiff," &c., and on that affidavit the justice indorsed, "execution against the body to issue—Wm. B. Meech. Issued November 13, 1857." The clerk noted in the docket this order of the justice, and issued execution accordingly to a

Carpenter agt. Willett.

constable, who made the arrest. The proceeding is claimed to be without legal justification, and I think rightly. The act of April, 1857, entitled an "act to reduce the several acts relating to the district courts in the city of New York into one act," proceeds as follows: "When a judgment is rendered in a case where the defendant is subject to arrest and imprisonment therein, it must be so stated in the judgment, and entered in the docket" (*Laws of 1857, ch. 344, § 50*).

This means that the justice must adjudge that it is a case in which the party is subject to arrest, and the right to arrest must be stated in the judgment; in other words form a part thereof. It is a part of his judicial labor and duty. The provision cannot be regarded as merely directory as to the mode of proceeding, or preserving the record of the district court. The duty being judicial in its nature, the statute requiring the act to be done is imperative. (*Brackett agt. Eastman, 17 Wend. 32; Sibley agt. Howard, 3 Denio, 72.*) It is a limitation of jurisdiction, and not a statutory direction to the officers of the court. If the provision related exclusively to the ministerial act of making an entry in the docket (which in this case was to be done by the clerk), it would be otherwise. It was no part of the judgment rendered on the 12th of November, that Doughty was subject to arrest and imprisonment. The right to arrest was not passed upon by the justice. However, the day following the rendition of the judgment, on an affidavit of the plaintiff that Doughty had received the money for which the judgment was obtained in a fiduciary capacity, the justice ordered execution to issue against his person. This subsequent proceeding cannot be supported. On the 13th of November, the justice had no jurisdiction to act. He was *functus officio*. What he did was not merely irregular but void. He had no more right to order an execution against this person on the day after he had rendered judgment, than he would have had three months

Carpenter agt. Willett.

thereafter. The district courts are of limited jurisdiction, and can only act in the mode pointed out by statute. We will look in vain for any provision in the act of 1857, remodeling their courts and their jurisdiction, for authority for this latter proceeding. There is nothing authorizing the justice to issue an execution against the person, upon being satisfied by evidence after judgment and *ex parte*, that the case is one for the arrest and imprisonment of the defendant. On the contrary, this feature of the non-imprisonment act of 1831, was expressly repealed as to the district courts in New York, by the district court act of 1857 (*Laws of 1836*, p. 403, § 30; *Laws of 1857*, ch. 344, § 81), altogether another jurisdiction was conferred. It was made as much the duty of the justice to pass upon the defendant's liability to an arrest, as upon his liability in the action, and to embody his judicial conclusion in his judgment. Not having done this when the judgment was rendered, he could not afterwards amend it in this respect. The district courts have no power to amend their judgments even if the proceedings of the 13th of November could be regarded as an attempt to amend. They can do nothing requiring the exercise of discretion. Having rendered judgment, they are from that time mere ministerial officers. But even if the power to amend existed, what was done the day following the rendition of the judgment was of no avail and void.

The statute prescribes that the defendant may be arrested and imprisoned in certain cases, and that the right to arrest shall be stated in the judgment; that is, shall form a part thereof, and no other order or form of order could satisfy the requirement. When it is stated in the judgment, it is the subject of review on appeal, and it is the only way in which the question may be reviewed on appeal. It was manifestly intended by the provision to secure to the defendant the right of appeal from an adjudication of the inferior court involving his personal liberty. Cases are

Carpenter agt. Willett.

specified in the statute where the defendant is subject to arrest and imprisonment (§ 16), and if it be a case where the defendant may be arrested, the execution issued by the clerk for the enforcement of the judgment, may direct the officer to arrest and commit him to the jail of the county until he pay the judgment, or is discharged according to law (§ 52). This execution issues of course, and there is no provision as in the non-imprisonment act of 1831, for ascertaining by proof *ex parte*, after judgment, whether it be a case for an execution against the body, nor was any necessary. It was not left to the discretion of the justice or clerk, from which there could be no appeal, to determine upon an *ex parte* hearing after judgment, whether it was a case under the statute in which execution should go against the body. It must be determined by the judgment rendered in the action whether it be such a case, or there is no provision for determining it at all, and being made part of the judgment, the right of appeal on this ground is secured to the defendant.

I am of the opinion therefore, that the case was properly disposed of in the court below. Doughty was arrested and detained by void process, and no action can be maintained by the plaintiff against the defendant as sheriff, for suffering him to escape. I believe the proposition to be universally true, that wherever the process by which one is arrested is void, no action can be supported for his escape. When the process is void, the creditor has no just ground of complaint that the person of his debtor is not holden in custody by it.

The judgment of the superior court should be affirmed.

Warth agt. Radde.

SUPREME COURT.

JOHN W. WARTH agt. WILLIAM RADDE, and others.

An action by a *shareholder of an unincorporated joint stock company* against a defendant as the president and treasurer of the company, to compel an accounting of the whole property, and an investigation into its whole affairs and business, cannot be sustained without making all the shareholders parties; or unless commenced by the plaintiff for the benefit of all others standing in the same situation, as well as for himself.

A cause of action against a defendant, under a contract made by him individually, for a specific sum of money, cannot be joined with a cause of action against him as the president or trustee of an association.

Neither can the claim against the defendant alone, be united with causes of action against him and others jointly. The causes of action must not only all belong to one of the enumerated classes under section 167, but all must affect all the parties to it.

New York Special Term, January, 1865.

DEMURRER to complaint.

A. R. DYETT, *for plaintiff.*E. F. HALL, *for defendants.*

CLERKE, J. This is an action, first, against Radde in his individual capacity, under a contract made by him with the plaintiff and one Miller, by which he agreed to pay each of them, severally, on the sale of certain lands which he had recently purchased, twelve and a half cents for every acre which he should sell; second that he should account for all the lands, moneys, &c., of the Pennsylvania Land and Farm Association, which had come into his hands or under his control, the plaintiff being one of the shareholders, and that the value of plaintiff's two shares be ascertained and paid out of the property and effects of the association.

The complaint also prays that the defendant, the Potter County Forest Improvement Company, account for all the property of the land association which has come under its

Warth agt. Radde.

control, and alleging that Radde, the said company, and the defendant in person, are acting in collusion to defraud the shareholders. It prays that they be enjoined from disposing of or intermeddling with the property of the land association. This recital is sufficient to show that this action in its present shape, cannot be maintained. If it were an action brought by a stranger against this unincorporated association for some claim against it, there would be no necessity to make the shareholders defendants, as it is shown that the association consists of more than seven persons, and Radde is sued as president and treasurer of it, as well as in his individual capacity. But as we have seen, the action is commenced to compel an accounting of the whole property, and investigation into the whole affairs and business of the association. It is besides an action for a fraudulent breach of trust against a person having the whole management and control of its property and effects. All the shareholders, therefore, should be made parties, or the action should be commenced by the plaintiff for the benefit of all others standing in the same situation, as well as for himself. If such is necessary in an action of this nature against an incorporate association (*Cunningham agt. Pell*, 5 *Paige*, 407), it is still more necessary in an action against one that is not incorporated (§ 119, *Code*).

The second cause of action is against Radde, under a contract made by him in his individual capacity, for a specified sum of money. This cannot be joined with causes of action against him as the president or trustee of the association (§ 167, *Code*). Moreover, this claim against Radde alone is united with causes of action against him and others jointly. The causes of action must not only all belong to one of the enumerated classes under section 167, but all must affect all the parties to it. To employ the language of the court in *Enos agt. Thomas* (4 *How.* 48), "the causes of action to be joined must be in favor of all

Barnard agt. Pierce.

the plaintiffs, and against all the defendants, and must belong to the same class."

Judgment for the defendant Radde, with costs, unless the plaintiff amend his complaint within twenty days, and pay costs of term.

BUFFALO SUPERIOR COURT.

IRA BARNARD agt. FRANCIS PIERCE, and others.

A notice of appeal from a judgment of a justice of the peace, under section 371 of the Code, which states that "*the judgment is for too much,*" is not a compliance with the provisions of this section so as to allow costs to the appellant on his recovery of a more favorable judgment in the appellate court.

If the respondent should offer to allow the judgment to be corrected in this particular, and the appellant should accept the offer, the justice could not make any correction of the judgment. (*The cases of Fox agt. Nellis, 25 How. Pr. R. 144; Wynkoop agt. Holbert, Id. 158; and Forsyth agt. Ferguson, 27 Id. 61, considered.*)

December General Term, 1864.

Before VERPLANCK, MASTEN and CLINTON, Justices.

APPEAL by plaintiff from the taxation of costs on a judgment at special term, rendered on appeal from a judgment of a justice of the peace.

R. SAUNDERS, *for plaintiff.*

HUMPHREY & PARSONS, *for defendants.*

By the court, MASTEN, J. The plaintiff recovered in a court held by a justice of the peace \$62.25 damages, and for which judgment was entered with costs. The defendants appealed. In the appellate court the plaintiff recovered \$62 damages. The clerk taxed costs in favor of the plaintiff. The special term set aside that taxation, and ordered the clerk to tax costs in favor of the defendants. From this order the plaintiff appealed.

The question is, which party is under the statute entitled

Barnard agt. Pierce.

to costs on appeal from the justice's court? The recovery in the appellate court was more favorable to the appellants than was that in the court below. The question of costs before us turns upon the notice of appeal. The statute is, "in the notice of appeal the appellant shall state in what particular or particulars he claims the judgment should have been more favorable to him. Within fifteen days after the service of the notice of appeal the respondent may serve upon the appellant and justice an offer in writing to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal. The appellant may, thereupon, and within four days thereafter, file with the justice a written acceptance of such offer, who shall thereupon make a minute thereof in the docket, and correct such judgment accordingly."

The language of the statute is clear and perspicuous. I am unable to see how there can be any doubt as to the intent of the legislature. Indeed, I find it difficult to point out the intent more clearly than the statute expresses it. And yet it seems to be necessary to make the attempt. For we are referred to three reported decisions giving construction to the statute, and they do not harmonize. One of them, *Fox agt. Nellis* (25 *How. Pr. R.* 144), sustains the decision of the special term. The special term probably put its decision upon its authority. A party appeals because he thinks himself aggrieved. This statute requires him in his notice of appeal to specify with particularity in what he feels himself aggrieved, so that the respondent may consider upon his judgment and conscience the specifications, and stop the litigation by allowing the judgment to be corrected according to all of the specifications, or such of them in respect to which he thinks the judgment in the appellate court may be more favorable to the appellant than the judgment in the court below.

"In the notice of appeal, the appellant shall state in what particular or particulars he claims the judgment

Barnard agt. Pierce.

should have been more favorable to him." That is, he is not to generalize, but is to particularize, to specify minutely and in detail in what the judgment should have been more favorable to him. These statements or specifications must be made separately and with such precision that the justice, if the respondent shall allow any of them, can correct the judgment from the statement or specification in the notice of appeal. "Within fifteen days after the service of the notice of the appeal, the respondent may serve upon the appellant and justice an offer in writing to allow the judgment to be corrected in any of the particulars mentioned in the notice of appeal." All the respondent can do is to offer to allow the judgment to be corrected according to the specifications in the notice of appeal, or any one or more of them, to be designated in the offer. If he should make an offer to allow the judgment to be corrected different from the statement or claim in the notice of appeal, the offer would be nugatory. Under this statute the appellant is the actor, the respondent the person acted upon.

The statement in the notice of appeal in the case is: "The judgment is for too much." This plainly is not a compliance with the provisions of the statute under consideration. If the respondent had served an offer and followed the language of the statute, it would have been: "I offer to allow the judgment to be corrected in the particular mentioned in the notice of appeal." The acceptance of the appellant would have been: "I accept the offer of the respondent." Upon these papers and the notice of appeal the justice could not make any correction of the judgment. The exposition which I have given of this provision of the statute has been expressed in the opinion delivered in two cases in the supreme court. (*Wynkoop agt. Holbert*, 25 *How. Pr. R.* 158; *Forsyth agt. Ferguson*, 27 *How. Pr. R.* 67.) The question before us was not directly up in either of those cases.

In *Wynkoop agt. Holbert*, the plaintiff recovered \$140

Barnard agt. Pierce.

damages in the justice's court. The defendant appealed. In the appellate court the plaintiff recovered \$68.59 damages. The statement in the notice of appeal, upon which the question of costs turned, was: "The judgment should have been in his (the appellant's) favor, for no cause of action and for costs." That statement was specific enough, but was not within the provision under consideration. If the judgment of the appellate court had been for the defendant, the question of costs would have been determined by the first clause of the 371st section of the Code. It is: "Costs shall be allowed the prevailing party in judgments rendered on appeal in all cases, with the following exceptions and limitations." Then follows the provisions above quoted. The provision under consideration applies to those statements in the notice of appeal wherein the appellant concedes that the judgment appealed from is in some respects correct, but claims that in some particular or particulars the judgment should have been more favorable to him than it is. Under it the judgment is not to be reversed but corrected, and is to stand as corrected. The court very properly awarded costs to the plaintiff.

In *Forsyth agt. Ferguson*, the plaintiff recovered \$60 damages in the court before the justice of the peace. The defendant appealed. In the appellate court the plaintiff recovered \$55 damages. The statement in the notice of appeal was: "The justice adopted an improper rule of damages; the damages should be merely nominal under the evidence, *if the plaintiff is entitled to any damages*. The judgment should have been for the defendant and against the plaintiff." The court held these not to be sufficient statements within the statute. The learned judge who delivered the opinion of the court, after giving a clear exposition of the act said: "The statement does not indicate an intention to allow the judgment to stand for even nominal damages. * * * But from the notice taken together, the import of the statement is that the

Barnard agt. Pierce.

judgment is wholly erroneous. To conform to this section of the statute, it should be claimed unqualifiedly that the judgment should be reduced to some certain amount, or corrected in some other respects specified in the notice."

* * * The justice has no power under the section to reverse the judgment or enter one in favor of the appellant, but merely to amend that already rendered. In *For* agt. *Nellis*, the plaintiff recovered \$159.50 damages before the justice's court. The defendant appealed. In the appellate court the plaintiff recovered \$130 damages. The statement in the notice of appeal was: "The judgment at most should not have been for more than five dollars." The supreme court held the notice sufficient under the provision of the statute under consideration, and awarded costs to the defendant. The learned judge who delivered the opinion, places the decision upon the ground that the statement in the notice of appeal is equivalent to saying, "that the judgment was for too large a sum," and then proceeds to argue that such a statement is sufficient. I think the learned judge in his argument, and in the ground upon which he placed his decision, misconceived the provisions of the statute. He seemed to think that this provision of the statute made the respondent the actor instead of the appellant. That the appellant might generalize, but that the respondent must particularize. But I think the decision in that case, that the defendant was entitled to costs, was correct. I think that the statement in the notice of appeal was more specific than the learned judge seems to have allowed. I think it was equivalent to saying that the judgment should have been for five dollars only. If so, it was sufficient; had the respondent served an offer to allow the judgment to be corrected accordingly, the justice would have had no difficulty in making the correction. But the respondent did not make an offer to allow the judgment to be corrected. The plaintiff recovered less in the appellate court than in the court below, and the statute plainly pro-

Barnard agt. Pierce.

vides for such case in the first clause of the following sentence: "If such offer be not made, and the judgment in the county court be *made* favorable to the appellant, *then* the judgment in the court below, or if such offer be made and not accepted, and the judgment be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs." The words "*made*" and "*then*," are doubtless clerical errors. The word "*made*" should be "*more*," the word "*then*" should be "*than*."

The second clause of the above quoted sentence embraces those cases where the appellant states several particulars in his notice of appeal, in which he claims the judgment should have been more favorable to him, and the offer of the respondent is to allow the judgment to be corrected in respect to some but not all of them. It seems to me that it would be more consistent with the general object of the act, if the above quoted sentence read: "If such offer be not made, and the judgment in the appellate court shall in any particular stated in the notice of appeal be as favorable to the appellant as he claimed in such notice it should have been, or if such offer be made and not accepted, and the judgment be more favorable to the appellant than the offer of the respondent, the appellant shall recover costs."

For agt. *Nellis*, shows that the appellant may, in his notice of appeal, state a particular in which the judgment should have been more favorable to him, which the respondent could not and should not allow, and by which the costs of the appeal as the statute now is are put upon the respondent if the recovery in the appellate court is but a trifle more favorable to the appellant than it was in the court below.

The plaintiff in the case before us is entitled to costs on the appeal. The order of the special term should be reversed.

McKeon agt. Lee.

NEW YORK SUPERIOR COURT.

ELIZA McKEON agt. WILLIAM S. LEE.

An injunction will issue to restrain a defendant from using or running his factory (steam engine for marble work) which he has built closely adjoining the plaintiff's premises, where it is shown that the plaintiff's premises are injured by the vibration of the defendant's building when the machinery is in motion.

New York Special Term, November, 1864.

THIS action was brought to recover the amount of damages alleged in the complaint to have been done to premises of the plaintiff by the steam engine and machinery of the defendant's marble works adjoining the same, and to obtain an injunction against the continuation of the injury.

BARBOUR, J. The evidence shows that the plaintiff is the owner of two well constructed brick houses adjoining each other in Bleecker street, three stories in height; that some time after those houses were built the defendant erected a five story brick building upon a lot adjoining the same, placing the southerly wall thereof, against and in contact with the northerly wall of one of the plaintiff's houses, and occupied and used the same as a steam mill for sawing marble, and for other manufacturing purposes, and still continues to do so; that the movements of defendant's steam engine and machinery cause a great vibration in the body of his building, and that the same is by means of the contiguous walls, communicated to the plaintiff's houses, where such vibration has been and is so great as to shake down the ceilings and loosen the walls of the houses, and otherwise greatly injure them, and to render them unsafe and uncomfortable to such an extent that their value for sale and for occupation has been lessened some forty or fifty per cent.

From these facts it seems evident that the defendant has not only disregarded the maxim "*sic utere tuo ut alienum*

Van Valkenburgh agt. Mayor, &c., of New York.

non lēdas," but also that other great rule in equity, which requires every man to do by others as he might properly desire them to do by him were their relative conditions reversed. For if he had not placed his wall in actual contact with that of the plaintiff, but had left a space of no more than half an inch between the two, it is hardly probable that any vibration would have been communicated to the houses of the latter, of which she would have a right to complain.

The plaintiff must have judgment directing an injunction.

SUPREME COURT.

ROMEYN VAN VALKENBURGH agt. THE MAYOR, &c., OF NEW YORK.

No act of the legislature appointing *commissioners* to perform certain duties in and for the city of New York, is binding upon the city, where there is no acceptance of the act by the corporation.

New York General Term, January, 1865.

Before LEONARD, P. J., BARNARD and SUTHERLAND, Justices.

APPEAL from judgment at Special Term.

for plaintiff.

JOHN E. DEVELIN, *Corporation Counsel for defendants.*

By the Court, BARNARD, J. The legislature of the state of New York (*Sess. Laws, 1860, chap. 505, page 1003*), enacted that certain persons therein named be constituted a board of commissioners "to locate and erect in the city of New York a suitable building, to be used as a court house and place of detention of persons brought to the police court in said district, and the ground and buildings so to be purchased and erected shall be the property of the city of New York."

Van Valkenburgh agt. Mayor, &c., of New York.

It is also, by the act, provided that the board of supervisors of the county of New York shall levy by tax an amount not exceeding \$50,000. Under this act the commissioners have selected and agreed to buy of plaintiff for and on behalf of the city the lands described in the complaint, and the city refuses to accept the deed, and the plaintiff brings this action against the corporate authorities to compel a specific performance of the contract. The defendant, by demurrer, presents this question— are the defendants liable for the acts of this commission? If these commissioners are by force of the act agents of the city, then this demurrer is not well taken, and plaintiff is entitled to judgment.

The first case in our court which I find bearing upon this question is *Appleton agt. The Water Commissioners of New York*, (2 Hill, 432). These commissioners were appointed by the governor and senate to construct the Croton aqueduct for the benefit and at the expense of the city of New York. It was held that the water commissioners were not liable, and that the remedy was against the city. The reasons for this judgment are not given.

In *Clark agt. The Mayor, &c., of New York*, (4 Comstock, 338), it was decided that the judgment, for work done under a contract with the Croton Water Commissioners, against the Mayor be reversed for errors on the trial, and the question of the defendants' liability is not noticed.

In the case of *Bailey et al. agt. The Mayor, &c., of New York* (5 Hill, 531), it was distinctly adjudged that the Water Commissioners were the agents of the city, but upon the ground that by the terms of the Water Commissioners' act the city had the power to accept the charter or reject it, and the common council did by resolution accept it, Mr. Justice NELSON using this language: "The acceptance was entirely voluntary, for the state could not enforce the grant upon the defendants against their will. This would be so on general principles (*Angel and Ames on Corporations*,

Basset agt. Crowell.

46, 50, and cases cited); but here the charter itself left it optional with the common council to accept or not."

This last case went to the court of errors, (*The Mayor, &c., of New York* agt. *Bailey*, 2 *Denio*, 433), and was affirmed; one senator only — senator BARLOW — holding the broad principle that the act of itself made the commissioners agents of the city.

I think, therefore, that the cases fail to establish the agency of the commissioners for the defendant in this case, where there was no acceptance of the act by the defendants.

It requires clear authority to warrant this claim. An agent established by law to purchase property for the defendant, and at its expense and without its consent, is an extraordinary assumption of power. I cannot yet assent to it.

Judgment affirmed, with costs.

LEONARD and SUTHERLAND, JJ., concurred.

NEW YORK SUPERIOR COURT.

ZENAS D. BASSET, Jr., and others agt. ARNER CROWELL,
and others.

It is a well settled principle of law, that where a vessel is sailed on shores, (not chartered) all the owners are responsible for her bills, especially where the items of those bills show they were for port charges.

New York General Term, December, 1864.

Before MONCRIEF, P. J., GARVIN & MC CUNN, Justices.

THIS is an action brought to recover the sum of \$1,174. 01, being moneys advanced by the plaintiffs for the defendants for and on account of the brig *Rogelem*, of which the defendants were owners.

Basset agt. Crowell.

E. C. BENEDICT, *for plaintiffs.*DEXTER HAWKINS, *for defendants.*

By the Court, McCUNN, J. It appears that R. M. Harrison & Co., of New Orleans, the agents of the brig, advanced this sum as port dues, &c; that one of the owners of the vessel requested that they, R. M. Harrison & Co., should draw on plaintiffs for the amount of the advances, the draft was accordingly so drawn, and was duly accepted and paid by plaintiffs, and the amount of said draft never having been paid back to plaintiffs, this action is brought against all the owners. Some of the defendants set up in their answer, after alleging some immaterial matter, that they were not responsible for the debts of the brig, for, although they were the owners, yet, at the time the advances were made, they had let the vessel out to one Crowell, a joint owner, and that said Crowell alone was responsible. This was substantially the principal issue. There is no dispute about the fact that the plaintiffs paid out about \$1,174.01 on account of the brig, and that the advances had been made at the request of one of the owners (Crowell), and the question is simply, was that advance of such a nature under the circumstances as to bind the other owners? I think clearly it was.

It appears from the evidence that the defendant Crowell was sailing the brig for the joint benefit of all the defendants, and each was receiving a share of the profits, and they all were to pay a share of at least some of the bills. The evidence is not that he had chartered the vessel, but that he was sailing her for the joint benefit of all the partners, the defendants themselves included. This evidence is uncontradicted, and of course at once fixes the liabilities of these defendants in this action. Clearly in law, then, these defendants were jointly responsible with Crowell for this debt. There is no more well settled principle in law than, that where a vessel is sailed on shares, all the

Kelsey agt. Murray.

owners are responsible for her bills, especially where the items of those bills show they were for port dues. This embraces all the important points of the case, and the exceptions should, therefore, be overruled, and the judgment affirmed, with costs.

MONCRIEF, Presiding Justice, and GARVIN, Justice, concurred.

SUPREME COURT.

CHARLES KELSEY agt. ROBERT MURRAY, United States Marshal.

An action to recover *wharfage* is an action for a mere *money demand*. And in such an action third persons have no right by which they can ask the court to be made parties for the settlement of a claim of the plaintiff against the defendant, without being asked to be made parties by either the plaintiff or the defendant. Section 122 of the Code is confined to actions for the recovery of real or specific personal property, but not to an action for the recovery of money.

New York Special Term, January, 1865.

THIS was a motion made on behalf of Ward & Gove for an order compelling the plaintiff to amend his proceedings by making them parties defendants in this action. The controversy was as to wharfage, over \$5,000, which the plaintiff claimed accrued to him because of the occupation of an addition to a pier at the foot of Sedgwick street, which he had erected, adjoining to another pier leased by him to Ward & Gove. A controversy had arisen about this addition, the result of which was that Kelsey had ejected Ward & Gove by legal process therefrom. He then sued the marshal to recover for the wharfage of the addition erected by him. After issue was joined in that suit, this application was made.

Kelsey agt. Murray.

S. SANXAY, *for Ward & Gove.*

E. S. VAIL, *for defendant, in support of the motion.*

DENNIS McMAHON, *for plaintiff, in opposition.*

INGRAHAM, P. J. Action for wharfage. The amount due is admitted. The only question is, whether the plaintiff is entitled to recover. Kelsey was the proprietor of the pier, as originally built, and leased it to Ward & Gove. During the lease the plaintiff built adjoining the outer end of the pier an additional pier which deprived Ward & Gove of the use of that side of the original pier. The wharfage accrued from vessels lying alongside of the new pier. Ward & Gove move to have the plaintiff amend his proceedings so as to make them parties to this action.

1. It is not necessary, for an entire adjudication of the questions between the plaintiff and defendant, that these persons should be admitted as parties; all the matters claimed by them can be set up as a defence to the plaintiff's claim, and unless the plaintiff establishes his title to the wharfage he cannot recover.

2. If neither the plaintiff nor defendant has asked to have Ward & Gove made parties, they have no right by which they can ask to be made parties for the settlement of a claim of the plaintiff against the defendant.

3. I do not think an action to recover wharfage can be said to be an action for the recovery of real or personal property. It is for a mere money demand. If an action to recover moneys claimed to be due is to be considered, an action for the recovery of personal property, then third parties may in all actions on contract seek to be brought in as parties to such actions where they have a claim adverse to the plaintiff. Such was not the intent of the 122d sec- of the Code, but it is confined to the recovery of real or specific personal property, but not to an action for the recovery of money.

4. If it were necessary to pass upon the question wheth-

Schuyler agt. Hargous.

er Ward & Gove have any right to this wharfage, I should hesitate before expressing my opinion to that effect. A similar question arose in the case of *Marshall agt. Givin* (1 *Kernan*, 461, 476), where a proprietor of a wharf claimed a right to the wharfage upon an extension of the original wharf. DENIO, J., says: "If there has been an invasion of the rights of the proprietors in that respect (by destroying the power to collect wharfage at the end of the pier), the law provides an appropriate remedy. That remedy does not consist in vesting in the proprietor of the rights taken away similar rights arising at another place, and which may be of a very different value from those of which they had been deprived;" and again, "The proprietor cannot make title to any part of the extended pier, or to any right of wharfage arising upon it." When Ward & Gove were dispossessed of their possession in the added wharf, they ceased to have any claim to wharfage.

The motion is denied, with \$10 costs.

NEW YORK SUPERIOR COURT.

COURTLAND SCHUYLER, agt. LOUIS E. HARGOUS, Jr., and
others.

Where, immediately after goods have been placed in the charge of *common carriers*, for transportation, two different parties, with distinct and separate interests, present themselves as claimants of the goods, one of which brings an action against the carriers, for the recovery of the goods, and the other threatens an action, it is a proper case for a bill of *interpleader* by the defendants under section 122 of the Code.

Where all the parties in such case consent, the *sheriff* may allow the ship to proceed on her voyage and have the goods sold in a distant port, and the proceeds brought here and deposited in court, which will be a valid protection to the *sheriff* for the sale of the goods.

New York Special Term, January, 1865.

MOTION by defendants for an interpleader, under section 122 of the Code.

Schnayler agt. Hargous.

RICHARD O'GORMAN, *for defendants and motion.*PORTER & NEWMAN, *for plaintiff, opposed.*

McCUNN, J. ✓ The defendants are common carriers, and the property in question was placed in their charge for transportation to a distant port. Immediately after the goods had been placed in their steamship, and after a large quantity of other freight had been stowed on top of the same, two different parties, with distinct and separate interests, presented themselves as claimants of the goods immediately before the sailing of the ship. One brings an action for the recovery of the goods, and the other threatens action. In this dilemma, the defendants, who are the mere custodians of the property, invoke the aid of this court, under the 122d section of the code, and ask that the party who claims the property be substituted in their stead as defendants, and I am of opinion that a more proper case for such interposition could hardly exist.

✓ The parties filing a bill of interpleader claim no relief from either party, they simply ask for the direction of the court as to their duty in the premises, and for this purpose, it is enough for them to know that the same debt is claimed or duty required by different and separate parties, and that they are uncertain with which of the two claims to comply. This was held by the chancellor to be the correct doctrine in a question of this nature in the case of *Bedell agt. Hoffman* (2 Paige Ch. R. 190).

This case is not similar, in any respect, to the case of *Victor agt. The United States and Mr. Cisco* (16 Abbott's Practice Reports). There the plaintiff, by his own motion, obtruded himself upon the court; he had placed himself in a position to be sued, by his own wrongful act, and he was not ignorant of the claims of the adverse party; here the defendants who seek this relief are innocent parties, and are forced into their present position by the acts of these several claimants.

People agt. Harrison.

As to the question of sale by the sheriff. The rule of law laid down in the case of *McRay agt. Harrower* (27 *Barbour*), is undoubtedly correct. It does not, however, apply in this case. In that case the sheriff sold without the order of the court, and without any consent from the parties in the action. In this case all the parties consented that the sheriff should allow the ship to proceed on her voyage, and that the captain should sell the goods in Havana and bring the gold, the proceeds of the sale of the goods, into court. ✓

The defendants' motion granted; and as they have been forced into their present position by the action of the several parties claiming the property, they should have costs.

SUPREME COURT.

THE PEOPLE agt. LEVI F. HARRISON, and others.

A bond given by a tavern keeper under the act of 1857, prohibiting the keeping of "a gambling table of any description," &c., is broken, where a *billiard table* is kept for use in such tavern.

Chautauque Special Term, January, 1865.

TRIAL by the court. Action to recover the penalty of a bond given by the defendant Harrison, as a tavern keeper, and his sureties.

WARREN & MORRIS, *for plaintiffs.*

W. A. BARDEN, *for defendants.*

MARVIN, J. The condition of the bond is, that Harrison, during the time he shall keep an inn, tavern or hotel, will not suffer it to be disorderly, or suffer any gambling, or keep a gambling table of any description, within the inn, tavern or hotel, so kept by him, or in any out-house, yard

People agt. Harrison.

or garden belonging thereto. (*See act of 1857, chap. 628, § 7, or Statutes at Large, vol. 4, p. 46.*) It was admitted upon the trial that the defendant Harrison, kept in the hotel, a billiard table; and that his guests and others used it, under a rule, that the losing party of each game, should pay to Harrison, for the use of the table, the sum of twenty cents. Harrison furnished lights and attendants.

The question raised is, was there a breach of the bond? It is argued that what was actually done, was gambling; and this position was earnestly denied. It is not necessary to decide this question. (*See the People agt. Sergeant, 8 Cowen, 139.*) In my opinion the condition of the bond was broken. By the act of 1801 (*see 1 R. L. 1813, p. 178, § 6*), the bond was to contain a condition, among other things, that the innkeeper should not "keep any billiard table or other gambling table, or shuffle board, within," &c. The same language is used in the Revised Statutes (*vol. 1, 679, § 7*). The statutes speak of disorder, cock fighting and gaming, or playing with cards or dice, and then follows the language touching the keeping of any billiard table or other gaming table, or shuffling board. We have seen the language of the act of 1857. He is not to suffer the inn or hotel to be disorderly, or suffer any gambling, or *keep* a gambling table of any description within the inn. By the Revised Laws and the Revised Statutes, there is a clear implication that a billiard table is a gaming table—a billiard table or *other* gaming table. The legislature so regarded it when kept in an inn or tavern, however it was regarded at common law. The prohibition in the act of 1857, is to the keeping of a gambling table of any description. In my opinion it was not the intention of the legislature by this change of words to change the law. I am, therefore, of the opinion that the condition of the bond in this case was broken, by keeping the billiard table in the manner it was kept within the hotel.

Arnold agt. Johnston.

It was admitted upon the trial that the defendant Harrison suffered gambling in the hotel. There must be judgment for the plaintiffs for the penalty of the bond, \$250.

NEW YORK COMMON PLEAS.

LEMUEL ARNOLD agt. ROBERT JOHNSTON.

A verbal assignment of a demand arising on contract, to the defendant against the plaintiff, before suit brought, in these words, "I assign this claim over to you if there is any difficulty," is not good as a *set-off* or *counter-claim*.

Special Term, January, 1865.

THE plaintiff sued the defendant for damages for breach of covenant in this, that the defendant had conveyed to him premises in Fifty-eighth street, in this city, with full covenants of warranty, seizin, and against incumbrances, yet that on the premises there were divers assessments which he was compelled to pay, and now sued to recover.

The defendant set up various counter-claims, amongst which was an alleged counter-claim for commissions said to have been earned by him in copartnership with one William H. Johnston, in selling for the plaintiff divers lots on Murray Hill, in this city. The defendant claimed that his partner had verbally assigned his interest in the claim over to him before the right of action had accrued to the plaintiff. The alleged assignment was by this language: "I assign this claim over to you if there is any difficulty." No consideration for the assignment was proven.

MR. LAWTON, *for the defendant,*

claimed the facts constituting his counter-claim were proven.

MR. McMAHON, *for the plaintiff,*

insisted that to constitute a valid set-off it must be shown

Arnold agt. Johnston.

to be a valid demand existing between the defendant and the plaintiff; that it existed in favor of the defendant and William H. Johnston against the plaintiff, did not authorize the application of the rules of set-off. He claimed that the assignment was invalid, as made without consideration, orally, and without any real intention to pass the right to the claim.

BRADY, C. In this case the plaintiff is entitled to recover the sum of \$76.87, with interest from 28th January, 1860. The assignment alleged to have been made by W. H. Johnston to the defendant of a demand against the plaintiff, was not such as the law requires, assuming for the purposes of this question, and only for that purpose that the demand existed in fact. The defendant states that W. H. Johnston said to him: "I assign this claim to you if there comes any difficulty," although the absence of any consideration might not affect the validity of the assignment, were it otherwise full in its substance, yet the conditional character of it shows that unless there was some difficulty between the defendant and the plaintiff in reference to the subject matter of this action the assignment was not to operate. I have not been able to find any case in which such an assignment has been sustained as a good set-off or counter-claim.

It may be looked upon as a transfer, to be of no effect until the instant of time when this action was commenced, because at that moment the difficulty must be regarded as beginning in relation to the claim herein prosecuted. Were the condition one which imposed some duty or obligation upon the defendant, or subjected him to any personal or pecuniary disadvantage, however slight, it might have the effect designed. The assignment here, however, presents no such characteristics. It is a conditional assignment without consideration, and intended to further litigation.

Judgment for plaintiff overruling the counter-claim.

Murphy agt. Boker.

NEW YORK SUPERIOR COURT.

THOMAS MURPHY, and others, appellants agt. HERMAN BOKER,
and others, respondents.

Where a sole *single issue* of fact is presented for the consideration of a jury as to what is the proper construction and meaning to be given to a clause in a contract of sale in these words, "plain seasonable No. 1 (buffalo) robes," to settle the quality of the article thus described, and six witnesses testify on that particular issue, *four* for the plaintiff and *two* for the defendant, their verdict for the defendant must be considered on appeal as *conclusive*.

The court can never exclude relevant testimony because it does not establish at once the issue to which it relates; the different links must be introduced in succession. The party against whom it is introduced is simply protected against any prejudice, by his right to call on the court to direct the jury to disregard it for all purposes where it is not *prima facie* evidence of any material issue. It is no ground of complaint that the court in such a case has not volunteered to warn the jury against being misled, or a reason to grant a new trial on the ground of an oversight.

Where every *exception* in the case bears on matters not relating to the sole issue submitted to the jury, and *evidence* is rejected not bearing on such issue, although competent for other purposes, the exception to it will not lie.

Heard General Term, November, 1864.

Decided December 31, 1864.

Before ROBERTSON, C. J., MONELL and McCUNN, Justices.

SOME time prior to the 16th day of September, 1862, the plaintiffs and defendants entered into a negotiation for the sale by the defendants to the plaintiffs of a lot of buffalo robes, which was consummated on the 16th of September, and a memorandum was signed by the defendants as follows:

"New York, September 16th, 1862.

"We hereby state that we have sold this day to Messrs. Murphy, Griswold & Co., 19 Murray street, about two hundred bales of buffalo robes, *plain seas. No. 1*, more or less, now stored at 29 Dey street, at price of \$5.37½ per robe, net cash on delivery. Delivery of fifty bales to be made on next and succeeding Monday.

"HERMAN BOKER & Co."

The words "*plain seas. No. 1*," was interlined in the

Murphy agt. Boker.

memorandum. On the 22d of September, the defendants delivered fifty bales of the robes from No. 29 Dey street, in pursuance of such memorandum, which the plaintiffs returned to the defendants and refused to receive. The defendants on the same day requested the plaintiffs to fulfill their contract, which they did not do. The plaintiffs refused to receive the robes, and never did accept any of them. The plaintiffs then commenced this action, averring that the defendants had refused to deliver the goods sold to them, and claimed damages in the sum of \$3,000 for non-delivery of the goods sold pursuant to the written memorandum. The defendants, among other defences, allege that they tendered the robes agreed to be sold, and that the plaintiffs refused to accept them, &c. There was no dispute about the fact that the robes mentioned in the written memorandum as being stored at No. 29 Dey street, were tendered to the plaintiffs by the defendants, and that they declined to receive them upon the ground that they were not, "plain seas. No. 1" robes.

A. R. DYETT, *for appellants.*

I. Under the pretence of establishing a title to affirmative relief by conforming the terms of the contract to the one really made, evidence of extemporaneous conversations, and of an alleged parol agreement was let in, which while it utterly failed to establish any mistake was before the jury, and could not fail to affect their decision by inducing them to believe that the words in question in the contract were entirely immaterial and of no consequence, because we had a full opportunity to examine the goods, and undertook to do so, and our not doing so was our own fault, *ergo*, "*caveat emptor!*" said the jury, and the defendant had a verdict. Had the jury been governed by the evidence upon the question whether the robes were such as described in the contract (and which was the only question in the

Murphy agt. Boker.

case), their verdict must have been the other way, or it would have been against evidence (*see point VII, infra*). It is scarcely necessary to cite authority to show that the evidence in question, except to show such a mistake in reducing the contract to writing as would call on a court of equity to reform it, could not have been admitted. The plaintiff could take no valid objection to the testimony when offered, and if it failed to prove the facts which it was offered to establish, it was in vain to attempt to overcome its effects upon the jury by any argument or charge from the court. The defendants evidently never expected to prove either fraud or mistake in reducing the contract to writing, but cunningly adopted that theory for the purpose of getting in this improper evidence, and they succeeded, but the court will not permit the plaintiffs to be thus defrauded of their verdict, and will grant a new trial on this ground alone. (1 *Grah. & Wat. on New Trials*, 54, 56, 361, 362, 369, 370; 2 *Id.* 43, 47, 50, 613, 645; 3 *Id.* 1204, *et seq.* 1527.)

II. The court erred in admitting the question put to the witness Funke, one of the defendants, by his own counsel: "Did you or not state positively what the quality of these goods was?" The answer of the witness illustrates the error. The written contract did positively state the quality, but the defendant was permitted to swear he "only expressed an opinion," which we concede would not be a warranty, or bind the defendants to deliver that quality of goods, and so doubtless the jury supposed. Such evidence was not even admissible to prove the defendants' allegation of mistake in inserting the words "plain seas. No. 1." not only because it did not tend to prove any such mistake as the court could take notice of, but because the witness' previous testimony showed that no such mistake had occurred.

III. The court erred in admitting the question at folios

Murphy agt. Boker.

61, 62. The previous question put to the witness and answered by him, was the proper one.

IV. The court erred in admitting the question, "what was the quality of those robes at that time?" for the reasons stated in the grounds of objection set forth in the case (*Code*, §§ 78, 159).

V. The court erred in excluding the question at folio 83, to the plaintiff Murphy. The object was to contradict Funke (*fols.* 28, 32, 34, 37, 38, 39, 41, 52, 53), but was competent for that purpose. *And see next point*, and the witness Murphy's previous evidence.

VI. The court erred in excluding the question at folio 84, to the same witness. It was not only competent to contradict Funke (*fols.* 29 to 54, *especially* 33 to 42), but was competent in rebuttal. Besides, as shown in our first point, the defendant had been permitted to smuggle in evidence of the conversations cotemporaneous with the contract and *inter alia*, that as they pretended, they did not know the meaning of the words "plain seas. No. 1." Yet this statement was allowed to go to the jury, and Murphy was prevented from showing that the defendant Funke, who made the contract and interlined these mystic words, did so without any pretence of ignorance of their meaning. The evidence was highly important, and the error was fatal in excluding it.

VII. The verdict, regarding the sole question to be (as it is) whether the buffalo robes tendered were such as described in the contract, was so clearly against the evidence as to show that the jury were influenced by partiality or prejudice, or misapprehended the evidence. Evidence for the plaintiffs,—Murphy, Michael Ball, Bouton, McKenna,—four witnesses: Evidence for defendants (*see point III*), *one witness only*, because the defendants' witness, Munroe, the clerk of defendants other witness, states that he understands "*plain seasonable No. 1*," to be the *same thing* as "*No. 1*," upon which point all the other witnesses, including

Murphy agt. Boker.

his employer, differ from him, and it is entirely inconsistent with the whole theory of the defendants' case. (7 *How. Pr. R.* 64; 1 *Cowen*, 109; 1 *Caines' R.* 162; 6 *Hill*, 444.)

The judgment should be reversed and a new trial ordered.

IRA D. WARREN, *for respondents.*

I. The only question submitted to the jury in this case was whether or not the robes tendered to the plaintiffs were what are known in the trade as "plain seas. No. 1" robes. The jury found this in favor of the defendants, which finding is fully sustained by the evidence.

1. There was no standard for "plain seas. No. 1" robes. In Murphy's testimony he swears he was in the habit of selling No. 3 for No. 1 to his customers.

2. The witness Herbeck, who afterwards bought this lot of robes and sold them to his customers, swears that they were in his opinion "plain seasonable No. 1." Also the witness Munroe, who saw and examined these robes, and sold a large part of them.

3. The plaintiff swears that he examined six bales of the robes and found the poorest of them as good as he sold to his customers as No. 1. He swears that No. 3 was No. 1 when robes were not plenty. The whole evidence upon that subject fully sustains the verdict, and there is no such preponderance in favor of the plaintiffs as to warrant a new trial. (6 *Cowen*, 682; 7 *Barb.* 271; 27 *Barb.* 528; *Stoddard* agt. *Long Island R. R. Co.* 5 *Sandf.* 180; *Adsit* agt. *Wilson*, 7 *How.* 64.)

II. The first exception taken by the plaintiffs to the question: "Did you state positively what the quality of those goods were?" is not well taken. It had no bearing on the question upon which the case went to the jury, and the answer could have no possible bearing as to whether the robes were "plain seas. No. 1." The motion at folio 54, was to strike out testimony the plaintiff had called out in

Murphy agt. Boker.

answer to a direct question. No exception was taken to this ruling (*Starkie on Evidence*, 144, 145, § 27). The next exception is not well taken. It was competent and proper to prove what a "plain seasonable No. 1" robe was, and if the objection was to the form of the question, it should have been so stated. The last exception is not well taken. The answer avers performance on the part of the defendants. The two exceptions at folio 83 are not well taken. They were questions put to the plaintiff, who had once been fully examined, and were not in rebuttal. It was immaterial how they got at the price. It could not determine whether they were "plain seas." robes or not. The jury found that the robes were "plain seas. No. 1," upon the only question submitted to them, and all these exceptions become immaterial. (*Smith agt. Kerr*, 1 Barb. 155; *Craig agt. Sprague*, 12 Wend. 41; *Hayden agt. Palmer*, 7 Hill, 118; *Forest agt. Forest*, 6 Duer, 102.)

III. All the questions of law as to the validity and construction of the pretended contract were decided by his honor the judge at the trial, in favor of the plaintiffs. But if he erred in so doing, and by a correct construction of the contract the plaintiff cannot in any aspect of the case recover, then the court will not grant a new trial if proper evidence was rejected, or improper evidence was admitted. (*Elsey agt. Metcalf*, 1 Denio, 323; *Edmonston agt. McLoud*, 16 N. Y. 543; *Horton agt. Hendershot*, 1 Hill, 118; *Hayden agt. Palmer*, 7 Hill, 385; *Hyle agt. Nelson*, 2 John. 46.)

IV. The contract claimed to have been made was for \$12,480.75 worth of buffalo robes, and as nothing was paid and no part of the goods delivered, the contract must be in writing, and must be subscribed by the parties to be charged thereby.

1. It was only signed by the defendants. The plaintiffs do not agree to take the robes; they do not agree to do anything. There is no mutuality. The case of *Lester agt. Jewett* (12 Barb. 502), is directly in point.

Murphy agt. Boker.

2. It is not *the contract*, but a statement in writing that the defendants have sold, viz.: by some other contract.

3. There is no consideration expressed in the contract, and none was proved on the trial; the plaintiffs do not agree to take the robes; they do not agree to pay for them, and not a word importing a consideration appears on the face of the contract, nor in the evidence. It is essential that the memorandum required by the statute of frauds should be a mutual, complete, valid, binding contract in all its parts, and if no consideration is expressed one must be proved. (*Burnet agt. Bisco*, 4 John. 235; *People agt. Howell*, 4 John. 293; *Parsons on Contracts*, vol. 1, p. 353; *U. & S. R. R. Co. agt. Brinkerhoof*, 21 Wend. 141.) The legislature did not intend when they enacted the statute of frauds, to make contracts less formal, nor to make contracts which were not contracts before. It simply requires *the contract*, of which the consideration is an essential part, to be reduced to writing. Under this agreement the plaintiffs were not bound to take the robes. (*L'Amoreux agt. Gould*, 3 Selden, 349; *Lees agt. Whitcomb*, 5 Bing. 34.) In the case of *Sears agt. Brink* (3 John. 209), which was decided before section 2 of the statute of frauds was amended, requiring the *consideration* to be expressed in the agreement, the court held that the memorandum in writing must show the consideration. When this decision was made, section 2 of the statute of frauds stood as section 3 now does. This decision has never been reversed, but has been referred to with approbation (*Brewster agt. Silence*, 4 Selden, 212).

V. By the terms of this memorandum it was the sale of a certain lot of robes, particularly pointed out and identified, viz.: "About two hundred bales, more or less, now stored at No. 29 Dey street." This was a sale of an ascertained and identified article, and not of a particular class or description of goods. In this case nothing but the identical goods sold would answer the contract, and the purchaser could call for none other under it. There is a clear

Murphy agt. Boker.

distinction between this and the sale of a particular class or description of goods, which can be filled by furnishing goods fairly answering the description given in the contract, and under which the purchaser has a right to call for goods of such description (*Addison on Contracts*, 2d American edition, 228).

(a) The plain significance of the language, the words "more or less," and the evidence at folios 12, 13, and throughout the case, show conclusively that none other than these particular robes were referred to or intended by the parties.

(b) The remedy of the plaintiffs if the goods did not answer the description was to refuse to receive them, and rescind the sale, or if the representation amounted to a warranty, to take the goods and bring an action on the warranty.

VI. The words "*plain seas. No. 1.*," were not a warranty, or a representation amounting to a warranty. A tender of the robes at 29 Dey street, was a compliance with the contract, and this view is fully sustained by the cases. (*Jennings agt. Gratz*, 3 *Rawle*, 168; *Carley agt. Wilkins*, 6 *Barb.* 557; *Windsor agt. Lombard*, 18 *Pick*, 1; *Farley agt. Bispham*, 10 *Barr.* 320.)

(a) The plaintiff had an opportunity to examine the goods, and in the absence of fraud the rule *caveat emptor* applies. (*Bierne agt. Burnside*, 1 *Selden*, 95; *Salisbury agt. Stainer*, 19 *Wend.* 159.)

VII. If the contract be held to be a sale with warranty of quality, the plaintiffs having sent back the part of the goods they had received, and refused the balance, and the defendants assenting, the contract was rescinded and at an end, and neither party is entitled to damages against the other. A purchaser with warranty cannot refuse to receive the goods and then recover for a breach of warranty. The ground of the action upon a warranty is that the goods delivered to and received by the purchaser do not answer the

Murphy agt. Boker.

warranty contained in the contract, and the measure of damages in all cases of a warranty is the difference between the value of the goods delivered, and that of such goods as they were warranted to be. (*Voorhies* agt. *Earl*, 2 *Hill*, 288, 291; *Crary* agt. *Graman*, 4 *Hill*, 625; *Muller* agt. *Eno*, 14 *N. Y.* 601; *Collins* agt. *Brooks*, 20 *How.* 237.)

VIII. The judgment should be affirmed, and the motion for a new trial denied with costs.

By the court, ROBERTSON, C. J. The learned judge before whom this cause was tried, submitted a single issue of fact to the jury, to wit: Whether the articles tendered by the defendants in satisfaction of the contract in controversy, were such as were generally known to the trade as plain seasonable No. 1 (*buffalo*) robes, and on all other points ruled as requested by the plaintiffs. He called their attention to the fact that there was a certain assortment of robes known in the trade as "P. Chouteau's No. 1 plain seasonable," and that was a standard description. * * * But the words used in the contract were "*plain seasonable No. 1*," the word "*Chouteau*," not being introduced. No exception was taken to the charge. A motion for a new trial on a case was denied. An appeal is taken from the order denying it, as well as the judgment. The main ground for moving to set aside such verdict is, that it was so clearly against evidence as to show partiality, prejudice or misapprehension on the part of the jury. And the admission of evidence to prove a mistake in the contract, which it failed to establish, is supposed to have contributed largely to such result.

The testimony of six witnesses was directed to the issue thus submitted to the jury. Two besides the plaintiff Murphy, and their porter (Ball), were introduced on the part of the plaintiffs, to wit: Mr. Bouton, a dealer in buffalo robes, and his porter (McKenna), and two on the part of the defendants; one of them, to wit: Mr. Herbeck, a

Murphy agt. Boker.

dealer in furs, and his salesman (Monroe). No meaning seems to have been attributed to the word "plain" beyond its ordinary sense. "*Seasonable*," was held to be applicable to skins obtained in the winter season, full grown, full furred, of dark color and good pelt. The principal difficulty was to settle the meaning of the term "*No. 1*," either with or without those words. Robes sent to the market as "*Chouteau's*," in the original packages, and sold as *No. 1 plain seasonable Chouteau's*, are understood to be of a certain kind, and are not generally examined by buyers. After those packages were broken and a new assortment made, it seems to have been difficult to fix the standard. Mr. Bouton (the buffalo robe dealer), who as he stated, always referred to those sold in the market as "*Chouteau's original assortment*," when he spoke of quality, testified that there was no assortment after it left Chouteau's hands, there *was no particular grade for No. 1*. "After leaving Chouteau's, *plain seasonable No. 1*, had a meaning within ten or fifteen per cent." When he sold his own *plain seasonable No. 1* robes, he always showed them. If a person sold without reference to Chouteau's standard, but in reference to the market, he ought to come within ten or twenty per cent of the original. The plaintiff Murphy testified, that there was no such thing as *No. 1 robes*. He did not know of any mark *No. 1*. There were no *No. 1*, but plain seasonable Chouteau's. Mr. Bouton reassorted his robes, and marked them *No. 1, plain seasonable*. Mr. Herbeck testified, that there had *been no standard* for what was known as plain seasonable *No. 1 robes*. "Every dealer made a different assortment. A *No. 1 seasonable skin* is supposed to be a very good skin; there are better skins, and they are making better every day." * * * "*There is no standard* by which to determine a strict *No. 1*." *No. 1, plain seasonable Chouteau's* * * * has reference to the size and quality of the robe." Mr. Monroe understood *plain seasonable No. 1*, to be the same as *No. 1*.

Murphy agt. Boker.

There was also some evidence that there was a class of robes known in the trade as No. 1, *imperfect*." Herbeck testified, that a *patched robe* was an *imperfect skin*. Ball (the plaintiffs' porter) testified, that either a patch on or a hole in it made it imperfect. There appears also to have been other robes known to the trade, designated as Chouteau's plain seasonable No. 2, and No. 3, and imperfect, or No. 4. Seasonable No. 2, was a full pelted skin, not as dark as No. 1, but a kind of yellow; the difference between it and No. 1, was in the color; it was larger than No. 3. No. 1 *damaged*, was a skin with spots in it; No. 2 *imperfect*, was where they were patched; No. 2 *damaged*, was an imperfect No. 1, with several spots on it, or holes in it; No. 3 was a No. 1 robe, with five or six spots in it; No. 4 was the worst quality, and was known as *plain seasonable imperfect*.

The testimony as to the character of the robes tendered by the defendants, consisted of that of Messrs. Bouton, Herbeck, Ball and McKenna, besides that of the plaintiff Murphy. The first named (Bouton), examined a lot of buffalo robes in bales, in the store where those in question were deposited, about the time of the sale. He examined twelve or fifteen bales taken promiscuously from the pile, and handled over every bale in the lot. They were mixed robes, according to Chouteau's original assortment, No. 1s, 2s and 3s. One-third No. 1, plain seasonable, all the rest inferior. His porter (McKenna) testified, "they were cut with rats; they were not perfect; * * * they were not like the company's robes at all." Mr. Herbeck bought two hundred and fifteen bales of the same lot, including about five and a half bales of loose. He examined fifty of the bales he bought at his own store, and opened a dozen before he bought. He considered them, except the loose skins, No. 1s, and sold them as such. He bought them for *plain seasonable No. 1 Chouteau's*, and in his opinion they were so. He found no No. 1 imperfect, or No. 2 in that

Murphy agt. Boker.

lot, except the loose skins. The plaintiff Murphy, testified, that of the fifty bales delivered to him, he examined some *six or eight*. They were *inferior* to the robes mentioned in the contract. They differed in *qualities*. Some few were good, but the majority were *inferior*. Out of six bales containing seventy-two robes so examined, three-eighths only complied with the contract; nearly one-third were *No. 1s, imperfect*; over about one-fifth *No. 2s, regular*; two were *No. 2s, imperfect*, and two *No. 3s*; all of inferior value to those mentioned in the contract. This evidence was corroborated by that of his porter (Ball).

The onus lay on the plaintiff of establishing what was meant by *plain seasonable No. 1s*, and if it meant only according to *Chouteau's standard*, that it did so even when no such name was expressed. There was evidence enough in the case to sustain a finding that it did not, and that it was intended merely to describe an assortment of a high character, within ten or twenty per cent of that standard, and that the limits were very vague. It is evident from the whole testimony of the plaintiff and his porter, they were testifying as to the inferiority of the goods tendered measured by the Chouteau standard. Neither of them describe the nature of the imperfection or inferiority stated by them, although Ball described the different grades of robes and the titles by which they are known. There was room, therefore, for the jury to infer that there was no such absolute standard as *plain seasonable No. 1s*, without Chouteau's name, or that it had a wide scope as to the quality of the goods, or that the plaintiffs did not make out a specific difference between the goods tendered and that standard. That verdict has been sustained by a justice of this court at special term, in the exercise of his discretion. And even if we would have come to a different conclusion sitting in place of the jury, that would not warrant an interference with the verdict. (*Stoddart agt.*

Murphy agt. Boker.

Long Is. R. R. Co. 5 Sand. S. C. R. 180 ; Dent agt. Farmers' Bank at Bridgeport, 27 Barb. R. 337.)

There certainly is no such preponderance of evidence as to induce us to think that the verdict of the jury originated in either passion, prejudice or mistake (*Cohen agt. Dupont, 1 Sandf. S. C. R. 260*). They were directed to confine their attention to a single issue, in the clearest terms, and were expressly warned against taking into consideration the fact that the goods tendered were those in the store mentioned in the memorandum. It is said, however, that the jury were allowed to hear and were not directed to disregard certain testimony admitted to establish an issue made by the defendants of a mistake in the contract, with a view to its reformation. It is very evident that the court can never exclude relevant testimony because it does not establish at once the issue to which it relates. The different links must be introduced in succession. The party against whom it is introduced is amply protected against any prejudice, by his right to call on the court to direct the jury to disregard it for all purposes, where it is not *prima facie* evidence of any material issue. Where his counsel neglects to do so, the court has a right to presume he does not think the evidence of sufficient importance to require such a caution. It is no ground of complaint that the court in such a case has not volunteered to warn the jury against being misled, or a reason to grant a new trial on the ground of an oversight.

Every exception in the case bears on matters not relating to the sole issue submitted to the jury. In reference to the evidence therefore rejected, not bearing on such issue, although competent for other purposes, no exception would lie (*Purchase agt. Mattison, 6 Duer's R. 587*). An exception was taken to a witness being required to answer: "*What the quality of certain robes bought by him from the same lot as those bought by the plaintiff was?*" upon the ground that the defendants admitted in their answer that the latter did

Murphy agt. Boker.

not correspond with the contract. Whereas the answer in its second defence alleged a tender to and refusal by the plaintiffs of the *buffalo robes agreed to be sold*, which took away the ground of such exception. The plaintiff Murphy, was prevented from testifying whether anything was said in his negotiation with the defendant Funke, *about knowing what such robes were*. That was claimed to be admissible, because such defendant gave as a reason on his cross-examination by the plaintiffs' counsel for not having stated that such robes were *plain seasonable No. 1*, that he did not know its meaning, which was quite different from his stating that as a reason at the time. A dealer in robes (Herbeck) was asked what he regarded as *plain seasonable No. 1 robes*? upon which he certainly had a right to express his opinion as an expert. The defendant Funke, was asked whether in the negotiation of sale he stated *what the quality of such goods* was? which was admissible to contradict a previous statement of the plaintiff Murphy, that Funke gave him *a statement that they were plain seasonable No. 1*. These constituted the only exceptions to testimony except one to the exclusion of a question put to the plaintiff Murphy, to detail a conversation by which he and the defendant Funke, *got at the price of the goods*, which was entirely immaterial.

The verdict of the jury being warranted by the testimony, and no exception to evidence being well taken, it will not be necessary to consider the other views taken by the counsel for the defendants. The grave questions whether the contract was not void under the statute of frauds? Whether a particular parcel of goods in a particular store only was sold? Whether the use of the words *plain seasonable No. 1*, made a representation or a warranty? and if the former, whether the defendants were liable without proof of a fraud? or if the latter, whether the refusal by the plaintiffs to receive the goods did not rescind the contract? are not necessary to be passed upon.

Stewart agt. Hamilton.

The order denying a new trial, and the judgment, must therefore be affirmed, with costs.

NEW YORK SUPERIOR COURT.

STEWART agt. HAMILTON.

A non-suit should not be granted on the ground that the plaintiff's counsel has not stated in his opening sufficient facts to constitute a cause of action.

Trial Term, January, 1865.

THE counsel for the plaintiff having opened his case in an address to the jury, the counsel for the defendant moved for a non-suit.

IRA D. WARREN, *for plaintiff.*

JOHN H. ANTHON, *for defendant.*

BARBOUR, J. (orally). I think it is not good practice to non-suit upon the plaintiff's opening address to the jury, and for the reason alone that he has failed to state to them sufficient facts to constitute a cause of action, although I am aware that such a practice has obtained in some of our courts. In his opening, the plaintiff's counsel may properly and usually does, state such facts only as he desires to impress upon the minds of the jurors. To hold him in his address to the exactness and certainty of a pleading, would, in many cases, be to impose upon him a duty which it would be exceedingly inconvenient if not impossible for him to perform orally. Indeed, I see no reason why he may not state to the jury, or refrain from stating just so much of the case as his judgment dictates.

I do not mean to say that a fatal admission made by the plaintiff's counsel in his opening, may not entitle the defendant thereupon, to a judgment dismissing the complaint,

Steere agt. Miller.

without the formality of taking evidence which must necessarily be useless. This motion, however, is not based upon such an admission, but merely on the ground that the counsel has not stated in his opening sufficient facts to constitute a cause of action. It must therefore be denied.

SUPREME COURT.

SMITH STEERE, JR. agt. ALANSON MILLER.

A party is not entitled to fees as a witness of his adversary, where he succeeds in the action, for testifying in his own behalf, notwithstanding he makes an affidavit that he would not have attended the trial but for the purpose of being such witness. (The several reported conflicting decisions on this question referred to as irreconcilable.)

Broome General Term.

Argued November, 1864. Decided January, 1865.

Present, PARKER, MASON and BALCOM, Justices.

APPEAL by plaintiff from an order made at the September special term of this court, at Norwich, Chenango county, 1864, denying his motion for a readjustment of defendant's costs.

The action was tried before a referee at Norwich, who decided that the plaintiff was not entitled to recover, and that the defendant was entitled to a judgment against the plaintiff for costs. The costs were adjusted by the clerk of Chenango county, who allowed the defendant \$21.96 fees, as a witness in the cause in his own behalf. This item was objected to on the ground that a party is not entitled to fees as a witness. But the clerk overruled the objection. The defendant presented his affidavit to the clerk on the adjustment of the costs, in which he stated he resided at Buffalo, 262 miles from Norwich; that he attended as a witness in his own behalf on the trial of the action before the referee two days; that he was a material and necessary

Steere agt. Miller.

witness in his own behalf in said action, and without his testimony he could not safely proceed to trial therein; that he attended the trial not as a party but solely as a witness, and should not have attended the same had his attendance not been required as a witness; that for the purpose of attending the trial as a witness in his own behalf, he actually traveled from Buffalo to Norwich and back, a distance of five hundred and twenty-four miles.

The plaintiff made a motion at the aforesaid Chenango special term of this court, for a readjustment of the costs in the action, and that the charge of \$21.96 fees of defendant as a witness in his own behalf, be struck out on the ground that a party is not entitled to witness fees for himself, it not being a disbursement in the cause, &c. The motion was denied, with \$10 costs, and the plaintiff appealed from the order denying such motion to the general term of this court.

ISAAC S. NEWTON, *for plaintiff.*

S. S. MERRITT, *for defendant.*

BALCOM, J. I held in *Cornell agt. Potter* (15 *How. Pr. Rep.* 278), that a party to an action who testifies as a witness in his own behalf, under section 399 of the Code, is not entitled to witness' fees as costs in the action, when he beats his adversary, and the reasons I assigned for this conclusion in that case, are yet controlling with me. The fees of witnesses are disbursements, and a party cannot pay or become liable to pay fees to himself as a witness, and hence he has no claim for fees as a witness for himself, on the ground that they are disbursements in the action.

A party attends the trial of an action as a party, though he be sworn as a witness therein in his own behalf. He does not attend in obedience to a subpoena, nor at the request of any party as a witness. He goes to the trial on his own motion as a party, and testifies as such, though in name

Steere agt. Miller.

and form "the same as any other witness." Parties are prohibited by statute from recovering fees for the attendance of their attorneys or counsel as witnesses, on the trial of a cause (2 R. S. 651, § 15). There would be abuses of the process of subpoena, if a party could recover fees for the attendance of his attorney or counsel as a witness on the trial of his cause, upon an affidavit that the attorney or counsel would not have attended the trial except for the purpose of being a witness for his client.

I remarked in *Cornell* agt. *Potter*, that "it would be useless to lay down a rule that a party can recover fees as a witness when he attends as such, and not when he attends as a party, although examined as a witness in his own behalf, for parties would be informed of the rule and attend as witnesses, or would generally swear they attended as such." And I now venture the assertion that in districts where the suggested rule has been adopted, very few successful parties to actions have testified as witnesses for themselves, without making affidavits that they attended the trial of their actions as witnesses and not as parties, and that they would not have attended at all but for the necessity of being witnesses for themselves. Yet we all know that parties seldom permit their causes to be tried without attending the trial in person, to advise with their counsel and aid them by suggestions on the examination and cross examination of the witnesses.

The rule that permits a party to recover fees as a witness for testifying in his own behalf, when he swears he attended as a witness and not as a party, &c., is wrong in principle and vicious in practice. It would be much better to allow parties who testify for themselves to recover fees as witnesses of their adversaries, without requiring them to swear as above stated, than to allow them to recover such fees upon affidavits that they would not have attended the trials of their causes but for the purpose of being witnesses for themselves. But in my opinion such a rule

Stearns agt. Miller.

should not be established by the courts. If parties ought to recover fees as witnesses of their adversaries, I think the legislature should pass an act to enable them to do so, for I do not believe a correct interpretation of existing laws entitles them to recover such fees.

It can hardly be said that the decision of Justice CAMPBELL, in *Walker agt. Russell* (16 *How. Pr. Rep.* 91), is in conflict with the above conclusion. My conclusion is certainly sustained by the following cases, viz.: *Christy agt. Christy* (6 *Paige Ch. R.* 170); *Perry agt. Livingston* (6 *How. Pr. R.* 404); *Logan agt. Thomas* (11 *Id.* 160); *Case agt. Price* (9 *Abb.* 111); *S. C.*, (17 *How. Pr. Rep.* 348). The following decisions have a contrary bearing, viz.: *Que-rissle agt. Hilliard* (3 *Abb.* 31); *Rogers agt. Chamberlain* (7 *Id.* 452); *Logan agt. Brooks* (8 *Id.* 127); *S. C.* (17 *How. Pr. Rep.* 29); *Hanna agt. Dexter* (15 *Abb.* 135); *Taack agt. Schmidt* (25 *How. Pr. Rep.* 340); *Bonner agt. Frauenthal* (20 *Id.* 255); *S. C.* (12 *Abb.* 183); *Howes agt. Barber* (10 *Eng. L. & E. Rep.* 465). I shall not comment upon or review these cases. They are irreconcilable. The court of appeals must determine which are correct. But I must adhere to my conclusion expressed in *Cornell agt. Potter*, that a party is not entitled to fees as a witness of his adversary when he beats him, for testifying in his own behalf, simply because he afterwards swears that he did not attend the trial of the cause as a party, and would not have attended it at all but for the purpose of being a witness in his own behalf. And if my brethren should agree with me, this will be the rule in the sixth district unless the court of appeals should hold adversely, and the order appealed from in this case will be reversed with \$10 costs, and an order will be granted directing the clerk of Chenango county to readjust the costs in the action by striking out the charge of \$21.96 fees of the defendant for attending the trial and testifying as a witness in his own behalf, and that the plaintiff have \$10 costs of his motion for the readjustment.

Steere agt. Miller.

PARKER, J. Upon taxation of costs in this case the defendant was allowed fees as a witness in his own behalf, it appearing by his affidavit that he attended the trial solely as a witness, and would not have attended had his attendance not been required as a witness. The plaintiff moved at special term for a readjustment, which was denied, and he now brings the question here upon appeal.

The authority upon which witness' fees are allowed to a party to an action against his adversary, is found in section 311 of the Code, which is as follows: "The clerk shall insert in the entry of judgment, on the application of the prevailing party * * * the sum of allowances for costs as provided by this Code, the necessary disbursements, including the fees of officers allowed by law, the *fees of witnesses*, the reasonable compensation of commissioners in taking depositions, the fees of referees, and the expense of printing the papers for any hearing when required by a rule of the court. The disbursements shall be stated in detail and verified by affidavit." The rate at which witnesses' fees are chargeable, is fixed by the act of 1840 (*Session Laws* 1840, 331), and this merely provides how much the witness is entitled to receive of the party for whom he attends the trial, and does not make the amount chargeable in favor of one party against the other. The witness is entitled to fifty cents for each day's attendance, and traveling fees at the rate of four cents per mile going and returning, and this he can recover of the party at whose instance he attends the trial, and of him alone. These are what is meant by "the fees of witnesses," in the section of the Code above quoted. As between party and party, it is only as a disbursement paid by a party to his witnesses, that witnesses' fees are allowable. Unless a party has paid, or becomes liable to pay fees to a witness, he is not entitled to recover them, and the fact of such payment or liability must appear by affidavit. Now although a party has attended the trial of his own cause as a witness merely, it

Steere agt. Miller.

does not follow as a matter of necessity that he has paid out or become liable to pay in such attendance the sums allowed by law to witnesses, and if he is ever allowed to charge his opponent with witnesses' fees for such attendance, it can be only on its being shown specifically in his affidavit that he has paid out or become liable to pay in such attendance the sums charged. In this case there is no proof that the defendant paid out anything; that it cost him a single cent to attend the trial; and in the absence of such proof I am unable to see any pretence under which it can be claimed that there has been any *disbursement* of witnesses' fees.

But I do not wish to rest my decision upon this ground. In view of the fact that witnesses' fees are allowable only as disbursements, I think a party who attends and is sworn in his own behalf, cannot, in any case, be allowed to recover fees for such attendance. Such fees in that case are not a disbursement made by a party to the witness, which is plainly what the statute contemplates. As was said in *Cornell agt. Potter* (15 How. 281), "a party to an action cannot pay or become liable to pay fees to himself for attending the trial thereof as a witness, and a charge by a party for fees as a witness for attending the trial of the action and testifying in his own behalf, cannot be properly denominated a disbursement." Grant that he is put to expense equal in amount to what the fees of a witness for the same service would be, that expense is not distinctively witnesses' fees; it is the personal expense of the party to the action merely. Bearing in mind that "witnesses' fees" are an allowance which the witness is entitled to receive from the party in whose behalf he attends the trial, and that he has no claim on the opposite party for them, it is manifest that no witnesses' fees accrue in such a case. There is no such thing as witnesses' fees chargeable by the witness to the party against whom he is called to attend the trial and testify; and yet what is claimed as witnesses'

Stoere agt. Miller.

fees by the defendant in this case, is precisely such a charge; the primary and only claim for them is upon the plaintiff, the party against whom the attendance of the so called witness was had. The entire theory of the statute is contravened by allowing them.

Although there have been numerous decisions of this question at special term which were cited upon the argument, still they are so conflicting as to avail nothing as authorities, and although I find no reported decision made at any general term, yet it appears from a remark of Judge SMITH, in *Case agt. Pierce* (17 How. 353), that in the seventh district it has been held at general term that witnesses' fees are not recoverable by parties in such cases; while in the third district, according to 2 *Tiff. & Smith's Pr.* 439, the question has received a contrary decision. The question therefore is to be regarded as an open one, and we are remitted to first principles in its decision. It seems to me that a just construction of the statute leads to the conclusion that the fees in question are not allowable, and I am the better satisfied with this conclusion because I think the contrary one would lead to abuse of the privilege accorded to parties to become witnesses in their own behalf. However wise the provision which accords that privilege may be, I think no one who has observed the almost invariable contradiction between the statements of opposite parties made upon the stand as witnesses, will fail to deprecate the additional motive of fees to draw them to the stand. I think as a matter of principle, parties should not be allowed fees as witnesses, and am of the opinion that no such allowance is warranted by the statute.

The order appealed from should be reversed.

MASON, J., concurred.

Decision as stated in the conclusion of the opinion of Justice BALCOM.

Trustees of the estate of Kohnstamm agt. Foster.

SUPREME COURT.

The TRUSTEES of the estate of KOHNSTAMM agt. CHARLES W. FOSTER, impleaded, &c.

A general assignment for the benefit of creditors, is such an acknowledgment or promise in writing by the assignor, as under the provisions of the Code, takes a note of the assignor, the payment of which is provided for in the assignment, out of the operation of the statute of limitations.

New York Special Term, January, 1865.

TRIAL by the court.

FLAMEN B. CANDLER and EDGAR S. VAN WINKLE, *for plaintiffs.*

WM. M. PRICHARD, *for defendant.*

JAMES, J. This action was tried before me without a jury. The only question of dispute arises upon the note dated July 11, 1857, for \$10,000, payable at three months, which matured October 14, 1857, the action not having been commenced until November 19, 1863. To this note the defendants interposed the statute of limitations, and to take it out of the statute the plaintiffs proved that on the 31st day of December, 1857, the defendants made a general assignment of their property to one Howland, in trust for their creditors, and that said assignment, after providing for the payment of expenses, &c., provided for the appropriation of the fund realized therefrom, to certain debts named in a schedule annexed, which said schedule contained this note of \$10,000. Plaintiffs further show that said assignee under said assignment, out of the proceeds thereof, paid on said note December 28th, 1858, \$966.60, and October 4th, 1859, \$966.61. Two questions are thus presented:

1. Was the execution and delivery of assignment a suffi-

Trustees of the estate of Kohnstamm agt. Foster.

cient acknowledgment in writing within the Code, to take the case out of the statutes? and

2. Did the payments made by the assignee in pursuance of said assignment, bar the statute?

I am not aware that the first question has ever been passed upon by the courts. The law now in force upon this subject is one enacted by the Code (§ 110), which declares that no acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take a case out of the operation of the statute of limitations, unless the same be contained in *some* writing, signed by the party to be charged thereby. It seems to me that this assignment contains all the elements required by this statute; it acknowledges the debt in writing, and is signed by the party to be charged. The Code does not define what the writing shall be, it merely requires the acknowledgment or promise to be contained in *some writing, signed* by the party charged, and for aught I can see, it can as effectually be made in a general assignment for the benefit of creditors, as in any other instrument.

The second question has been before the courts in *Barger agt. Denvin* (22 Barb. 68), and *Pickett agt. King* (34 Barb. 193). In the former Justice EMORR, at special term, held that payment by an assignee was the act of the assignor by his agent duly authorized, and was evidence of a new promise. In the other case, the court at general term disapproved of Justice EMORR's decision, and held the other way. On this question, therefore, I am bound by the decision of the general term, however much I may doubt its correctness. But upon the first question I have no doubt, and therefore dispose of this case upon that point alone. I hold that the assignment was a sufficient acknowledgment to take the case out of the statute, and that the action having been brought within six years after such acknowledgment, the plaintiff is entitled to recover the balance due on said note.

Lee agt. Marsh.

SUPREME COURT.

JOHN M. LEE AND E. F. ELLIOTT agt. NATHANIEL MARSH,
receiver, &c.

It must now be considered as settled in this state that *common carriers* may limit their liability for *negligence* in almost any respect by *express contract*, for such consideration as will be satisfactory to the passenger or freighter, and that such contracts are not against public policy.

Where a common carrier is not liable for the effects of an accident by which a part of his freight of live animals have been killed, he is not liable for the *delivery of the dead animals*, where his contract is to deliver them alive.

New York General Term, November, 1864.

Before LEONARD, SUTHERLAND and BARNARD, Justices.

APPEAL from a judgment for plaintiffs entered on report of referee.

D. B. EATON, *for appellant.*

A. PRENTICE, *for respondents.*

By the court, LEONARD, J. The referee has found as a fact in this case that the defendant was guilty of negligence in running the train of freight cars when the accident occurred, on a dark and stormy night, at the rate of fourteen miles an hour, and adds that such negligence was not willful. Nor does he find that it contributed to produce the accident. The contract was for the transportation of live stock belonging to the plaintiffs over the Erie railroad, which was operated by the defendant as receiver, and exonerated the defendant from all liability for loss or damage that might happen from any other cause than the willful negligence or fraud of the defendant or his agents. The contract also states that the rate of compensation to be paid by the plaintiffs has been reduced in consideration of their assuming these risks. It is evident then that if the contract is valid, the defendant is not liable for the

Lee agt. Marsh.

damage arising from the accident mentioned in the case, as the occurrence was without any willful negligence on the part of the defendant or his agent.

The referee has found, however, as his conclusion of law, that the law does not permit the defendant to restrict his liability as a common carrier for negligence. In this conclusion he appears from the recent decisions to be in error. I think it must be considered as settled in this state that common carriers may limit their liability for negligence in almost any respect by express contract, for such a consideration as will be satisfactory to the passenger or freighter, and that such contracts are not against public policy. (1 *Kern*. 485; *Dorr* agt. *The N. J. R. and T. Co.* 24 *N. Y. R.* 181; *Wells* agt. *The N. Y. Central Railroad Co.* 25 *N. Y. R.* 442; *Bissell* agt. *The N. Y. Central Railroad Co.*)

The counsel for the plaintiffs insists that they are entitled to recover, although the referee may be wrong in respect to the law and the reasons which he has given for his report in favor of the plaintiffs, because a part of the stock although killed by the accident, was not delivered at its destination according to the contract. It appears that the animals which were killed by the accident had a marketable value if immediately dressed, and the plaintiffs insist that the contract is broken by reason of the failure to deliver the carcasses. But who was to dress the animals and prepare them for market immediately? Certainly the defendant was under no such obligation. This attention was required in order to preserve any value in the dead animals, and overcome the loss which had apparently befallen the plaintiffs in consequence of the accident. I am not prepared to assent, however, to the proposition that the defendant was liable to deliver the carcasses. The character of the freight was changed when the animals were dead. The defendant was bound to deliver the animals alive, unless relieved from so doing by some condition of his contract, and the delivery of their dead bodies would

Smith agt. New York Consolidated Stage Co.

not relieve him from responsibility for the failure to deliver them alive, if the loss arose from causes not within the risks from which the plaintiffs had agreed to relieve the defendant.

The agents of the defendant, it appears by the report, offered to carry the dead stock through if one of the plaintiffs, who accompanied the train and was present at the accident, would take charge of them. The plaintiffs refused to take charge of, or to have anything to do with the dead and dying animals. The plaintiffs have no claim to recover on the ground so urged by their counsel.

The judgment should be reversed, and a new trial had before the same referee, the costs to abide the event.

NEW YORK COMMON PLEAS.

HUGH SMITH AND JOHN KERR agt. THE NEW YORK CONSOLIDATED STAGE CO., AND AUGUSTUS SCHELL.

Where an action is brought to annul and set aside an assignment made for the benefit of creditors, as illegal and void, and an injunction is issued and served upon the defendants, including the assignors and their assignee, commanding the assignee, his agents, servants, attorneys and all persons acting under him, to refrain and desist from disturbing, holding possession of, or interfering in any manner with the property and effects of the assignors, or any part or portion of the same, it is a violation of the injunction and a contempt of the court, for the assignee thereafter to bring actions against the plaintiffs and others to collect choses in action belonging to the assignors.

Special Term, January, 1865.

MOTION by plaintiffs for enforcement of proceedings as for contempt, in the violation of an injunction order.

A. R. LAWRENCE, JR., and HAMILTON W. ROBINSON, *for plaintiffs.*

CHARLES A. RAPALLO and WILLIAM F. ALLEN, *for defendants.*

Smith agt. New York Consolidated Stage Co.

CARDOZO, J. The defendant Schell, does not deny bringing the suits against the plaintiffs and others, which are complained of as being a violation of the injunction in this case. If bringing those suits were a breach of the injunction, it is clear that even if the power of the court be limited by the provisions of the Revised Statutes respecting proceedings as for contempts, to enforce and protect the rights of parties in civil actions, which I by no means concede, it was misconduct on his part by which the rights or remedies of plaintiffs have been "impaired, impeded or prejudiced." The plaintiffs had a right, and that was part of the object of this action, to prevent any meddling with the property of the New York Consolidated Stage Company, by a person not legally authorized to have the custody of or to interfere with it, and it will be difficult to see why they are not impeded and prejudiced, when one having no right attempts in violation of the order of the court to interfere with it. It was an attempt to do the very thing which the court has decided the plaintiffs had the right to prevent the defendant Schell from doing, and it is the merest sophistry to say that the plaintiffs' rights and remedies have not been impaired, impeded or prejudiced, when that which the court decides the plaintiffs are entitled to prevent the defendants from doing is done, despite the order of the court. Nor does the fact that it was understood in open court that any proper act for the preservation of the line should not be deemed a violation of the injunction, afford any answer or protection. That stipulation was given on the suggestion that the line would have to be stopped, and that the horses would die from want of feed, unless Mr. Schell were allowed to do what was necessary to keep it going, and could not possibly have misled any one.

- Were the suits brought by Mr. Schell a violation of the injunction? A very specious, but I think manifestly unsound argument has been made on his behalf. The assign-

Smith agt. New York Consolidated Stage Co.

ment to Mr. Schell purported to convey all the property of every character of the company. The complaint in this suit sought to annul that assignment. It charged that the assignment was illegal and void; that the directors had no power to make it, and that Mr. Schell had taken possession under it of all the property and effects of the company, and it prayed, among other things, that Mr. Schell might be enjoined and restrained from "in any manner disturbing, holding possession of, or interfering with the property and effects of the New York Consolidated Stage Company, or any part thereof, and that a receiver of said property and effects might be appointed." The order to show cause why an injunction should not issue and a receiver be appointed, which with the summons and complaint, was duly served on Mr. Schell, commanded him "and his agents, servants, attorneys, and all persons acting under him, to refrain and desist from disturbing, holding possession of, or interfering in any manner with the property and effects of the New York Consolidated Stage Company, or any part or portion of the same." It is admitted that the suits complained of were commenced after Mr. Schell had been duly served with the order. It is claimed, and authorities are cited quite unnecessarily to show that the language of an injunction should be plain, and that a party is not to be punished for violating an order which is so ambiguously expressed as to mislead him into the belief that the act complained of was not prohibited. This is undoubtedly the rule—it is only just—and if applicable to the facts here will be acted on. It is said that the subject of the suits brought by Mr. Schell were neither "property" nor "effects," and that therefore the injunction has not been violated. A very natural question arises, and it is this: If they are neither "property" nor "effects," what are they? The counsel for Mr. Schell said they were "mere choses in action." But "choses in action" are covered

Smith agt. New York Consolidated Stage Co.

by the term "property," which is a most comprehensive word (*see Bouvier's Law Dict. "Property"*).

While it is true that an injunction must be so expressed that ordinary people will not be misled, it is equally true that learned persons are not to be permitted to give an unusual, forced and ingenious construction to language, and then plead their learned ingenuity as an excuse for a violation of an order which would have been understood by the most ordinary intellect. A person astute enough to see the very nice and fine distinction which is made on behalf of Mr. Schell, must have been quite conscious that the words "property and effects," were of a very sweeping and general character, and could not have been ignorant that they included "mere choses in action." Any person of ordinary capacity would have understood that "all the property" of the Consolidated Stage Company meant everything to which that company could have any right, and no one of ordinary mind could have imagined that when ordered to let "everything" alone—not to interfere with it in any manner—he was not ordered to let that part of "everything" alone which was only a "mere chose in action." Mr. Schell cannot be permitted to shield himself by asserting that he misapprehended that which is plain to the meanest understanding. The language of the order is to be understood according to its ordinary import, and we are not to strive to put upon it by ingenious construction, a meaning different from its natural significance, because of the position which the defendant occupies. It is especially the duty of prominent citizens to obey scrupulously the orders of the court, and they should receive no encouragement in efforts to evade them by shallow pretexts. The administration of the law will become justly contemptible when persons of education, character and position, can escape the consequences of disobedience to the order of the court, by resorting to such refined and artificial attempts

Smith agt. New York Consolidated Stage Co.

at construction as have been invoked on behalf of the defendant.

A single other remark will exhibit the groundlessness of the defendant's plea. If Mr. Schell supposed that the words "property and effects," contained in the injunction did not include mere "choses in action," how did it happen that he gave a different construction to those words when contained in the assignment? If they did not cover "choses in action," then he cannot pretend to have any title to the choses in action which he is endeavoring to collect by the suits complained of, and that is a position he will hardly assume. It is very idle for Mr. Schell to say that he understood "all property and effects" one way when he read the assignment, and another way when he read the injunction. It is manifestly an afterthought and a subterfuge. I am, therefore, of opinion that Mr. Schell has clearly violated the injunction, and that the case is within the provisions of the Revised Statutes. But it is sworn that the acts done by Mr. Schell were done under the advice of counsel; that they were not prohibited by the injunction, and were innocent. While, undoubtedly, advice of counsel will not excuse a violation of an injunction, yet if given in good faith, it is an important element in considering what the judgment of the court should be. If the suggestions which I am about to make are acted upon, the authority of the court will probably have been, after what I have said, sufficiently vindicated to render any further action, except perhaps to determine a question of costs of motion, unnecessary in this case. It is within Mr. Schell's power to undo his violation of the injunction. That must be done. The suits brought in disobedience of the order of the court must be discontinued. I cannot listen for a moment to any other suggestion after having carefully examined and decided, and not having the slightest shadow of a doubt that the assignment to Mr. Schell was utterly void, and when I see that no harm can pos-

Smith agt. New York Consolidated Stage Co.

sibly accrue by his obeying the order of the court, since it is not pretended that the supposed causes of action are in danger of being barred by the statute of limitations, or that any other reason exists for such great haste. If the order made be right; and the alleged causes of action exist, the receiver is the only proper person to bring and prosecute the suits. There is not the slightest reason to apprehend any mismanagement of or damage to a trust confided to the gentleman who has been made the receiver in this matter. Beyond this he is under the immediate supervision and control of the court, and certainly a person who it has been decided has no interest in the premises, cannot be permitted to dictate to or interfere with him. A little less haste on the part of Mr. Schell, in a matter in which no especial occasion for speed has been disclosed, would have saved the necessity of the present motion, and even if he be right in claiming that the assignment is valid, a little loss of time, very unimportant when compared with upholding the dignity of the court, will be the only detriment which can arise from his discontinuing the suits in question, and obeying the order "not in any manner to interfere" with the property or effects of the New York Consolidated Stage Company. If within two days after notice of this opinion (which notice may be given by a letter to defendant's attorney, apprising him that my opinion herein has been filed), Mr. Schell causes the suits brought in violation of the injunction to be discontinued, and presents to me an affidavit of the fact within the same time (a copy of which, with notice of the time and place, when and where it will be handed to me, must be served on the attorney for the plaintiffs in this action), probably, except to dispose of the question of the costs of this motion, I shall feel that all has been done which is necessary to vindicate the majesty of the law. If this suggestion be disregarded, I will make such order as I think the circumstances demand.

Town agt. Steamship Western Metropolis.

UNITED STATES COURT.

TOWN and others agt. STEAMSHIP WESTERN METROPOLIS.

Where the claimants file exceptions to a libel, the libellant has a right under the 24th admiralty rule of the supreme court, to move to *amend his libel* in any of the points excepted to, without submitting to the exception, as provided for in rule 94 of this court.

Where the offending vessel in a case of *collision* is arrested in this district, this court has *jurisdiction* of the cause of action even though the collision occurred on the Potomac river, *out of the district*.

Cases of maritime torts committed upon navigable waters are cognizable in the admiralty within any district where the vessel may be apprehended.

Where the claimant excepted to eight distinct matters of form in the libel, it was *held* that the points of exception embraced matters which are sufficiently explicit and certain to a common intentment, or are appropriately subjects of proof, and need not be set out in the pleadings.

In Admiralty. United States District Court, Southern District of New York, January, 1865.

STATEMENT—The libellants filed their libels claiming \$7,875 damages done to the schooner Mary C. Town, in a collision on the Potomac river, by the steamer Western Metropolis. The claimants filed eleven exceptions to the libel, eight of which were on matters of formal statement. Three of them, however, tended to a point of considerable magnitude, viz.: as to whether or not this court had jurisdiction over a case of marine tort committed in the navigable waters of another district. On the exceptions coming in Mr. McMAHON, for the libellants, made a motion to amend his libel in three of the points excepted to, and claimed that he could do so without submitting to the exceptions on those particular parts, and referred to rule 24 of the admiralty (*Supreme Court, U. S.*). Mr. DONOHUE, for the claimants, insisted that the regular practice was for the libellant to wait until the argument of the exceptions, and to submit to the particular exceptions against which the amendment was sought. The counsel referred to rule 94 of this district.

Per curiam, BETTS, J. The libellant moved the court on

Town agt. Steamship Western Metropolis.

notice to the proctors of the claimants, for leave to amend the libel in particulars of form pointed out by notice. The counsel for the claimants opposed the motion on the ground that exceptions to the libel were pending in court, not submitted to by libellant and unanswered by the libellant, and that he cannot be allowed in such case to amend his pleading. It appears to me the matter is specifically provided for by the rules of the supreme court (*Admiralty Rules, No. 24*). The libellant is entitled of course to have an amendment of his pleading until he shall be concluded by judgment of court against it upon exceptions taken to it on the part of the claimants (*Betts' Practice, 58*). The claimants have taken no steps to enforce their exceptions to the libel, and the party who brought the action is accordingly free to ask to rectify any error or imperfection found in his pleadings.

Motion granted.

The remaining exceptions to the libels as thus amended, were brought on for argument before same judge.

C. DONOHUE, *for claimants, in support of the exceptions.*

I. The courts of the United States rebuke any informal statement of the case in the pleadings which does not apprise the adversary of what he has a right to expect. Therefore, although the counsel for the libellants may denominate these exceptions as merely formal, yet they are on matters of substance, such as from which quarter the wind blew. He has stated the same as being from the northward. Northward is not north. It is important for the claimants to know the exact quarter whence the wind blew. They are entitled to that information from the libel. Then again it is not definitely stated how far the vessels were apart at the time of the collision. The Potomac river at the point of the collision is two miles wide, and the claimants cannot know save from a statement in the

Town agt. Steamship Western Metropolis.

libel as to what part of the river the vessel was in when collided against. So also the course the steamer was on is not definitely stated.

II. This court has no jurisdiction over a marine tort committed on the navigable waters of another district. The collision here occurred on the waters of the Potomac river. In this court by a number of decisions, such a jurisdiction has been denied. (*See Drummond agt. Raft of Spars*, Dec. Term, 1852; *Minute Book*, 64, p. 96; *Tuttle agt. Hogg*, 9 *Wheaton*.)

D. McMAHON, *in reply*.

I. The first exception is as to the jurisdiction of the court. The libel it appears was filed in this district where the offending vessel was seized, and that the collision took place on the tide waters of the Potomac river. This court has jurisdiction. (*The Propeller Commerce*, 1 *Black's Rep.* p. 574; see also *Nelson agt. Leland*, 22 *How. U. S. S. C. R.* 48.)

II. The second exception is involved in the first, and proceeds on the theory that the libel does not state or set up facts or a cause of action within the jurisdiction of the court. We assume that it does so state the necessary facts. The case presented is one of a *collision* between the schooner *Mary C. Town*, owned by the libellants, and the steamship *Western Metropolis*. The libel states the collision took place "within the admiralty and maritime jurisdiction of this honorable court, *to wit: on the tide waters of the Potomac river (second allegation of libel)*. In the third allegation of the libel, it gives more particularly the locality of the collision, viz.: two miles above and to the west of Blackstone Island lighthouse, and about in the middle of the river, which in that vicinity is about two miles wide. In the first allegation of the libel it is alleged that the *offending vessel at the time of the filing of the libel was within the*

Town agt. Steamship Western Metropolis.

jurisdiction of the court. In the last allegation of the libel the general averment of jurisdiction is made, so that every fact is stated in the libel within the case of the "Commerce," sufficiently to clothe this court with the necessary jurisdiction.

III. The third exception is that the libel does not state the point from which the wind blew at the time of the collision, with certainty. In the third allegation of this libel it is stated "that the schooner was coming down, all sails set," *a fair breeze from the northward, say about seven knots an hour.* It then gives the course of the schooner, viz.: southeast by east, half east, "*the wind bearing on the larboard side of the vessel.*" At the end of the fourth allegation is this statement: "That owing to the wind the schooner could not have prior to the collision, starboarded her helm, without running the risk of coming up in the wind and becoming unmanageable." Here then are all the elements necessary to show the course of the wind. 1st. Wind from the northward. 2d. Schooner on the southeast by half east course. 3d. Wind bears on the larboard side of schooner. 4th. Could not starboard helm without coming up into wind and becoming unmanageable. These allegations, and this course of navigation show distinctly that the wind was due north, or nearly so.

IV. In the fifth exception the claimants complain that the libel does not set forth how far the vessels were apart when steamer was seen from schooner. In the third allegation of the libel, the libellants say: "about ten minutes before eight o'clock, P. M., *she (i. e., schooner) descried the steamship Western Metropolis about two miles off, coming up the river under full headway.*" This statement we submit is sufficiently specific, and even were it not in the libel, we submit that it is not important as to whether or not the libel should state *how far apart* the two vessels *were at the moment* of seeing each other, if the course of the two ves-

Town agt. Steamship Western Metropolis.

sels otherwise properly appear in the libel, as we submit they do in this case.

V. Matters of detail, matters of particularity, are the proper office of evidence, not to stuff into pleadings. In fact all that the 23d rule, supreme court U. S., in admiralty cases requires is, "that the libels shall propound and articulate in distinct articles the various allegations of facts upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article."

This rule excludes all statements of detail and of minute particulars. Under this rule, all that would seem to be required would be, 1st. The names of the two vessels. 2d. The locality of the collision. 3d. The general directions of the wind and tide. 4th. The respective speed of the two vessels. 5th. The fact of the collision, and of the general course of the two vessels up to the point of contact. 6th. Points of negligence. 7th. Facts showing jurisdiction. 8th. Damages. All the rest becomes matter of evidence.

Conklin in his Admiralty Practice (2d vol. p. 483), says, in speaking of the requisites of libels: It may be said in general, therefore, as of the correspondent part of a bill in equity, that in this part of the libel every material fact to which the libellant intends to offer evidence, ought to be distinctly stated, for otherwise he will not be permitted to offer or require any evidence of such fact. But in the one case as in the other, a succinct general charge or statement of the matters of fact is sufficient, provided it be clear, accurate, and to all necessary and convenient extent certain as to the essential circumstances of time, place, manner and other incidents, and it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge, for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proof. (*See Story's Eq. Pl.* § 28, 241; *The Palmyra*, 12 *Wheaton*, p. 13, when speaking of the

Town agt. Steamship Western Metropolis.

requisites of libels in rem; Wade agt. Leroy, 20 How. U. S. S. C. R. p. 43 and 44, opinion; U. S. agt. Brig Neuren, 19 Id. p. 95 and 96, opinion.)

Per curiam, BETTS, J. A libel was filed in this court April 13, 1864, against the above named steamship, charging a tortious collision by her against the vessel of the libellants, the Mary C. Town. The claimants of the steamship filed eleven special exceptions against the sufficiency of the libel in point of law. The libellants obtained the leave of the court to amend their libel in respect to three of these special exceptions, and the case was heard before the court between the parties on the pertinency and validity of the remaining exceptions. The steamer was arrested within this district. The collision occurred upon the Potomac river, between two vessels navigating those waters, and the gist of the three first exceptions, therefore, denies the jurisdiction of the court in the case.

If the practice of the local courts justifies that construction of the law, or stated rules of the court, it is clearly erroneous. Cases for maritime torts committed upon navigable waters, are cognizable in the admiralty within any district where the vessel may be apprehended. (*Jackson* agt. *Steamer Magnolia*, 20 How. U. S. R. 296; *Nelson* agt. *Leland*, 22 Id. 48; *The Propeller Commerce*, 1 Black's R. 574.)

The other points of exception embrace matters which are sufficiently explicit and certain to a common intentment, or are appropriately subjects of proof, and need not be set out upon the pleadings.

Exceptions overruled, with costs to be taxed.

Holmes agt. Bennett.

SUPREME COURT.

RUTH HOLMES agt. ISRAEL BENNETT.

When the trial of a cause is moved at the circuit, if the judge is satisfied from an inspection of the *pleadings* that the trial of the issues of fact will require the examination of a long account, or if after a trial of a cause before a jury has been commenced at the circuit, it appears by the *evidence* that the trial will require the examination of such an account, the judge, of his own motion may direct a *reference* of the issues to a referee to hear and determine.

And the court can direct a *reference* of any referable action on the motion of either party, whenever it is satisfied by *legal evidence*.

Where the verified *pleadings* used on a *motion* for a reference show that the trial of the issues of fact in the action will probably involve the examination of a long account, the motion will be granted, notwithstanding the (otherwise valid) objection that the *moving affidavit* is made by the *attorney* and not by the party, without any excuse being shown why it was not made by the party.

Broome General Term.

Argued November Term, 1864. Decided January Term, 1865.

Present, PARKER, MASON and BALCOM, Justices.

APPEAL by defendant from an order referring the case to William N. Mason, Esq., to hear and report,—\$10 costs to abide the event of the suit, granted at the Chenango special term in August, 1864. The order was granted upon notice to the defendant's attorney, and the motion was founded upon the pleadings in the action and an affidavit of the plaintiff's attorney, which only showed the joining of issues of fact in the action, and the place of trial thereof. The motion was opposed by defendant. The claims stated in the complaint were for the rent of a farm, and the amount alleged to be due from the defendant upon two promissory notes.

The defences set up in the answer, were, 1st. A denial of the allegations in the complaint, except that the defendant made the two promissory notes therein mentioned, and he denied that he was owing the plaintiff anything on the notes. 2d. An agreement for the purchase of the farm by

Holmes agt. Bennett.

defendant, and the taking of a deed thereof by the plaintiff, and the working and improving of it by defendant, and matters connected therewith, as a defence to said notes. 3d. A set-off for money paid, laid out and expended, lent and advanced, for work and labor of defendant and his servants, &c., use of team, for timber, lumber, goods, wares and merchandise sold and delivered to the plaintiff, and for board, washing and lodging, &c., amounting in the whole to \$288.50. Lastly, a demand of judgment against the plaintiff for \$588.50, and interest.

The plaintiff served a reply in which she denied the allegations in the answer. The pleadings were verified by the parties.

ISAAC S. NEWTON, *for plaintiff.*

HORACE PACKER, *for defendant.*

By the court, BALCOM, J. Where the parties do not consent, the court may, upon the application of either, or of its own motion, except where the investigation will require the decision of difficult questions of law, direct a reference, where the trial of an issue of facts shall require the examination of a long account on either side (*Code*, § 271). The defendant's counsel insists that the order of reference was erroneously granted, because the attorney of the plaintiff made the affidavit showing the joining of the issues of fact in the action and the place of the trial thereof, when no excuse was given for the omission of the plaintiff to make it. This position is untenable. If the motion had been founded exclusively upon the affidavit, it could not have been granted, for the reason that the affidavit was insufficient and was not made by the plaintiff, and no excuse was given in it for her omission to make it. (*See 4 Hill*, 548; *2 How. Pr. Rep.* 7 and 157; *Tiffany & Smith's Pr.* vol. 1, p. 464.) But the affidavit was not relied upon to establish that the trial of the issues in the action

Holmes agt. Bennett.

would require the examination of a long account. No such fact was alleged in it. And the attorney knew as well if not better than the plaintiff when the issues were joined in the action, and the place of the trial thereof designated in the complaint. It was, therefore, proper for the attorney to make the affidavit showing those facts.

The plaintiff's counsel relied upon the pleadings to establish that the trial of the issues of fact would require the examination of a long account. They were duly verified, and I am of the opinion they show *prima facie* that the trial will require the examination of a long account. The presumption from the answer is that the defendant has such an account against the plaintiff. I think the defendant is estopped upon the question of the reference, to deny that he has such an account against the plaintiff as he has set up in his answer, or that it must be examined upon the trial. And I am of the opinion the judge at the special term had the right to infer and determine that such account was long.

When the trial of a cause is moved at the circuit, if the judge is satisfied from an inspection of the pleadings that the trial of the issues of fact will require the examination of a long account, or if after a trial of a cause before a jury has been commenced at the circuit, it appears by the evidence that the trial will require the examination of such an account, the judge, of his own motion, may direct a reference of the issues to a referee to hear and determine. The court can direct a reference of any referable action on the motion of either party, whenever it is satisfied by legal evidence that the trial of the issues of fact in the action will require the examination of a long account—and the pleadings are legal evidence upon that question—and when they show that fact the court may direct a reference of the issues to a referee to hear and determine.

My conclusion is that the judge at the special term had the right, as against the defendant, to determine from the

Von Bruck agt. Poyser.

answer that the trial of the issues of fact in the action would require the examination of a long account, and as the action was referable, the order of reference appealed from by the defendant should be affirmed, with \$10 costs to the plaintiff.

MASON and PARKER, JJ., concurred.

Decision accordingly.

NEW YORK SUPERIOR COURT.

MORITZ VON BRUCK and others, appellants agt. FREDERICK
M. PEYSER, respondent.

In an action against the defendant for *false and fraudulent representations* made to the plaintiffs of the solvency of a third person, by which the plaintiffs, as alleged, were induced to sell their goods to such person on credit, by reason of which they suffered loss, the defendant's liability depends upon the falsity of his statements and his knowledge thereof, and their effect upon the business dealings of the plaintiffs with the debtor. These are all questions of fact proper for the consideration of a jury.

Although it may be that the law will not presume and will not allow a party to claim that representations which are believed and acted on to-day, have a continuing influence for all time, and that there probably must be some *limit*; yet it is difficult, if not impossible to say where the period should be placed. Like all questions of a similar nature, the extent of time to which it is fair to presume or to permit a party to claim that the influences continued their effect, must depend upon the facts and circumstances of each case, and it is for a jury, and not for the court, to ascertain from the evidence and determine such fact. Therefore, the question in this case whether the plaintiffs were influenced in the sales made by them to their debtor in 1860, by representations made to them by the defendant in respect to his solvency in 1858, was one which should have gone to the jury.

December General Term, 1864.

Before ROBERTSON, Ch. J., MONELL and GARVIN, JJ.

THE action was to recover damages as well for a false and fraudulent representation made to the plaintiffs by the defendant, as for the fraudulent concealment from the plaintiffs of facts within the defendant's knowledge. On the

Von Bruck agt. Peyser.

trial, before a justice of this court and a jury, it was proved that on the first of February, 1858, the defendant wrote and transmitted to the plaintiffs a letter, of which the following is a copy :

“NEW YORK, February 1, 1858.

“Messrs. H. Von Bruck's Sons: I hereby respectfully advise you that I have this day made over my business, with debits and credits, to my brother-in-law and assistant for many years, Mr. Emil Kanter, who will continue the same with undiminished means, under the firm of ‘Emil Kanter, successor to Frederick M. Peyser.’ In giving you my best thanks for the confidence reposed in me hitherto, I beg that you will extend the same also to my successor, and I am,

Respectfully and humbly,

“F. M. PEYSER.”

One of the plaintiffs testified that after the receipt of this letter the defendant came to Crefeldt, in Prussia, the plaintiff's residence, on the 3d of June, 1858, and repeated the statement contained in the letter, and told the plaintiff that he himself being a man of property, and purposing to live in Europe thenceforth, had given up his business to his brother-in-law Kanter; that in fact the concern would remain altogether the same with an alteration of the firm; that these representations had the greatest influence on their business dealings with Kanter, to whom, being totally unknown to them, they should also never have allowed a single cent of credit. He further testified that they (the plaintiffs) perfectly relied upon the integrity of the defendant's statements, and felt safe in consequence. Upon his cross-examination, the same witness testified that at the interview with the defendant on June 3d, 1858, they wanted him to interpret the meaning of the expression in his letter, “undiminished means” (literally unweakened means); in answer to which the defendant told them that he himself being a man of property, and purposing to live in Europe henceforth, had given up his business to his brother-in-law;

Von Bruck agt. Peyser.

that in fact the concern would remain altogether the same with an alteration of the firm. It was admitted in the answer, that for a long time prior to February, 1858, the defendant had been engaged in a lucrative business in New York, and had realized a fortune; and had heretofore been accustomed to purchase goods of the plaintiffs on credit, and had always paid for the same.

The answer further admitted that at the time of the purchase Kanter had no property or means, except that the defendant at that time gave him a large amount of stock and fixtures, good will and lease of store, of the value of \$18,000 or \$20,000, which then became the property and means of Kanter. It was further admitted, that except as aforesaid, Kanter purchased the business upon credit, and that the defendant knew the facts above set forth as to property, means and credit. The defendant further admitted that for the purchase Kanter was indebted to him in the sum of \$7,000, and that he loaned him in addition \$2,000 more to carry on the business, and that at the time of the purchase Kanter gave him a chattel mortgage upon the goods which he had on hand.

The first purchase made by Kanter of the plaintiffs was July 10, 1858, and the last October 3, 1860. All the purchases made in 1858 and 1859 were paid. In 1860 the purchases amounted to 11,982 francs, which were not paid for. It was proved that the goods sent to Mr. Kanter were personally selected for him by the defendant from the plaintiffs' stock in their warehouse, or were ordered by the defendant to be manufactured for and sent to Mr. Kanter on credit. The plaintiffs gave in evidence two other letters, as follows:

"To H. Von Bruck's Sons:

"KRAMFTH, near Hamburg, June 29, 1860.

"I beg you after receiving this letter, to send me samples of velvet trimmings of all sorts of breadths, as I am

Von Bruck agt. Peyser.

inclined to give you an order for it, if the samples and prices are suitable.

Yours, &c.,

"FRED. M. PEYSER."

"Messrs. H. Von Bruck's Sons :

"KRAMPTN, near Hamburg, 16th July, 1860.

"I hereby take the liberty to give you for Mr. Emil Kanter, the following orders, and you will see to have good fabrics and fine selection of colors. I also beg you to let the goods be cut per 11 metre. As regards the conditions, you will receive payment from Emil Kanter in six months from the date of the invoice, by three months' drafts on Hamburg punctually. I hope you will be satisfied by it, as Mr. Kanter has received the same conditions from all his other European friends.

Yours, &c.,

"FRED. M. PEYSER."

At the close of the plaintiffs' evidence, upon the defendant's motion, the justice dismissed the complaint, and the plaintiffs excepted.

Judgment was thereupon entered, and the plaintiffs appealed.

C. WEHLE and T. DARLINGTON, *for appellants.*

W. H. PECKHAM, *for respondent.*

By the court, MONELL, J. The representation contained in the defendant's letter of the first of February, 1858, that Kanter, to whom he had sold and transferred his business, would continue it with "undiminished means," was a representation capable of being interpreted into meaning that the pecuniary means and facilities possessed by Kanter were equal to those possessed by the defendant, and that such means and facilities would be employed by Kanter in conducting his business as the defendant's successor. The defendant for many years had been engaged in the business to which Kanter succeeded, and from which he had acquired large wealth. His dealings with the plaintiffs had extended

Von Bruck agt. Peyer.

through a number of previous years, and they knew him to be a man of "means," and worthy of credit, and they believed not only from their own construction of the letter, with their previous knowledge of the defendant's circumstances, but from his subsequent interpretation of the significance of the words "undiminished means," that Kanter was equally worthy of credit. In the sales made to Kanter, the plaintiffs relied upon the integrity of the defendant's statements, and as one of the plaintiffs testifies, his representations had the greatest influence upon their business dealings with Kanter, to whom, being totally unknown, they should else never have given any credit.

There was sufficient evidence that the representations were made, and that they were relied upon by the plaintiffs in their subsequent dealings with Kanter. It hence became a question for the jury to determine whether the representations were capable of the interpretation placed upon them by the plaintiffs. The action was in *tort* for a false and fraudulent representation, which induced the plaintiffs to sell their goods to Kanter on credit. The defendant's liability depended upon the falsity of the defendant's statements and his knowledge thereof, and their effect upon the business dealings of the plaintiffs with Kanter. These were all questions of fact, proper for the consideration of a jury, and unless the length of time intervening between the receipt of the defendant's letter of February, 1858, and the sales in the summer of 1860, in judgment of law, operated to prevent any supposed influence which at an earlier period did operate upon the minds and govern the actions of the plaintiffs, then I think it was error to take those questions from the jury.

It may be that the law will not presume and will not allow a party to claim that representations, which are believed and acted on to-day, have a continuing influence for all time. There probably must be some limit, but it is difficult, if not impossible, to say where the period should

Ven Bruck agt. Peyer.

be placed. Like all questions of a similar nature, the extent of time to which it is fair to presume, or to permit a party to claim, that the influences continued their effect, must depend upon the facts and circumstances of each case, and, therefore, no general rule can be adopted. In all such cases it is for the jury and not the court to determine whether the parties continued to be operated upon by the representations previously made, and it would be proper to instruct the jury that they are to ascertain from the evidence and determine such fact.

The only case that I have been able to find in which this precise question has been discussed, is *Zabriskie agt. Smith* (13 N. Y. R. 322). There the representation relied on was made some months before the last sale, and the court says it is a question for the jury whether the sale was influenced by representations made some months previously. In short, that it was not a question of law, but of fact. I am, therefore, of opinion that the question whether the plaintiffs were influenced in the sales made in the summer of 1860, by representations made in 1858, should have gone to the jury.

There is another view of this case presented by the pleadings and proofs, which I will briefly notice. The action in part is founded on a fraudulent suppression of facts by the defendant, and there was some evidence to support that branch of the case. Kanter had no means, had purchased the business wholly on credit, and was largely indebted to the defendant therefor. These facts were known to and were suppressed by the defendant. In all the purchases made of the plaintiffs he acted as the agent and friend of Kanter. He had frequent personal interviews and written correspondence with the plaintiffs on Kanter's behalf. As late as June 29, and July 16, 1860, he gave written orders for goods to be sent to Kanter, in which he gave assurances that the bills would be punctually paid. At no time did he disclose to the plaintiffs the facts

Von Bruck agt. Peyser.

of the transfer of his business to Kanter, and Kanter's large indebtedness to him, for which he held a chattel mortgage upon all of Kanter's stock in trade, given, as it is fair to infer from the evidence, at or shortly after the sale. By the dismissal of the complaint, this branch of the case was also taken from the jury. It is quite clear, I think, that if the defendant knowing the facts attending the sale to Kanter, and his circumstances, did by his representations or acts, induce the plaintiffs to give Kanter credit, suppressing such facts, he would be liable in this action. Upon the whole I am of opinion that both the questions should have gone to the jury, and that it was error to dismiss the complaint.

Judgment should be reversed and a new trial ordered, with costs to abide the event.

ROBERTSON, C. J. The cause of action in this case consists of a deceit practiced by the defendant on the plaintiffs in the year 1858, by means of two knowingly false representations made by the former to the latter of the means and resources of one Emil Kanter, on the faith of which the latter sold to him merchandise, amounting in value to nearly \$2,800, on four occasions between the end of July and the beginning of October, 1860. The fraudulent concealment by the defendant of Kanter's embarrassments and indebtedness at the time of such representations set out in the complaint, not being alleged to have been made for any purpose of deceit, or to have had any connection with the sale, may be disregarded as being any part of the cause of action.

The first of such representations was by letter written in German, received by the plaintiffs in March, 1858. It announced a transfer by the defendant of "his business, with debits and credits," to Kanter, who was his brother-in-law, and had previously been his assistant for many years, who would "continue the same with (what is translated) undiminished means," under the firm of Emil Kanter,

Von Bruck agt. Peyser.

successor to the defendant. The latter requests the plaintiffs to "extend the same confidence to his successor" they had hitherto reposed in him. In the beginning of June following, one of the plaintiffs, in an interview with the defendant, "wanted him to interpret the meaning of the expression of (such) his letter" undiminished (or unweakened) means; in answer to which "he said" that he himself being a man of property, and purposing to live in Europe thenceforth, had given up his business to his brother-in-law; that in fact the concern would remain altogether the same, with an alteration in the firm.

At the time of making such representations, Kanter was indebted to the defendant for the whole purchase money of the greater part of his stock of goods bought on credit, and two thousand dollars for a loan of money, having no other means but such goods and borrowed money. In July, 1858, the plaintiffs sold Kanter considerable merchandise at six months credit, and also on six other occasions between that and June, 1859, all of which were paid for by the middle of March, 1860. In the year 1860, they again sold him in like manner, merchandise about the end of July, after receiving a letter from the defendant dated in the middle of that month (July), wherein he ordered certain goods for Kanter, and stated: "As regards the conditions, you will receive payments from Emil Kanter in six months from the date of the invoice, by three months' drafts on Hamburgh, punctually. I hope you will be satisfied by it, as Mr. Kanter has received the same conditions from all his other European friends." The plaintiffs also sold to Kanter other merchandise on three occasions in 1860, before the middle of October, but have received no payments for any goods sold in that year. They received a letter in May, 1861, dated on the 8th of that month, from the defendant, in answer to one addressed by them to Kanter, demanding payment, in which the defendant stated that Kanter would be able to pay their debt in full if they

Von Bruck agt. Peyser.

allowed him another year's credit. On the 18th of the same month the defendant took from Kanter a chattel mortgage on all his stock in trade, to secure the payment of nearly \$28,000, claimed to be the amount due to the former by the latter, for the purchase of his stock in trade and moneys loaned. After taking possession of such goods, and selling sixty-five hundred dollars worth of them, the residue was worth less than the residue claimed by the defendant. Judgments having been obtained against Kanter, his assets passed into the hands of a receiver.

In cases of this kind the plaintiff is bound to establish both a design to practice a deceit and reliance upon the means used to carry out such design, as an inciting cause to the credit given. There must always be a limit to the period of time before a credit given, within which a false representation made could not be given in evidence to establish an intent to accomplish such deceit, or the giving of the credit on the faith of its statement. The determination of that limit, where there are no other circumstances to fix it but the representation and the credit, cannot be left to the varying impression of juries in each case, but must be adjusted by rules of law. It is easy to specify a limit as a maximum, beyond which a representation could not be given in evidence to establish a deceit by its means; the difficulty lies in fixing the minimum, and there may always be a debatable ground in which the question becomes one of fact. In this case the representation was made in March, 1858, and the credit given in July, 1860, being two years and four months afterwards. Had nothing else intervened, it would be difficult to say that the former was admissible in evidence as the intended cause of the latter. Without inquiry or further information, the plaintiffs as persons of ordinary prudence, could not be presumed to have believed that the circumstances of a party would necessarily remain the same all that time. In *Zabriskie agt. Smith* (13 N. Y. R. 322), a lapse of seven months

Von Bruck agt. Peyer.

between a representation and a credit, was held too short for any presumption as matter of law that the former was not the cause of the latter, and the question was left to the jury. But the time in this case is quadruple of that in the case just cited, and it therefore does not furnish a decisive standard.

In this case, however, after a continuance of dealings between the plaintiffs and Kanter, until March, 1860, the defendant in July following, again intervenes, acting as Kanter's agent, but personally promising the punctual payment by the latter of his new indebtedness at the end of a proposed credit. This must be sufficient evidence of the continuation of the impression of the earlier representation down to the time of such new negotiations, or its revival, to allow it and them to go to the jury on the question whether the plaintiffs were influenced, however slightly, by them in such sale in 1860. The conduct of the defendant, and his relations with Kanter, were also sufficient *prima facie* evidence to be passed upon by the jury, of the knowledge by the former of the dealings between the latter and the plaintiffs. Knowing such dealings, he was bound also to know that such a letter as he then wrote was likely to renew or keep alive the impressions of his first representations, and induce the plaintiffs to recur to them in giving a new credit. Reiterated assurances of a person's solvency, in whatever form given, and at whatever intervals, provided the first have not entirely been forgotten, have a tendency to deepen the fading impression, even if it has been quite forgotten, to revive it, unless after a great lapse of time. Such was this case, and it should have been left to the jury to say whether the early representations had no influence in inducing the latter sales. Such a case is entirely different from credit given long after a representation of pecuniary ability. In such a case the possibility of a change of them would be such as to prevent any prudent

Von Bruck agt. Peyser.

man from relying upon such old representations, or trusting without a new inquiry.

It does not matter in this case that possibly the previous punctual discharge of his indebtedness by Kanter, or the new representation by the defendant of his ability to pay punctually, may have had a greater weight with them; it would still be a question for the jury whether the influence of the first representations so continued or revived, tended under the circumstances to induce the plaintiffs to sell to Kanter in 1860, the merchandise in question. The representation made by the defendant in 1858, was not merely generally of Kanter's solvency or responsibility. It was special. After announcing his purchase of the defendant's stock, good will and debts, the defendant proceeded to say that he would carry on the business with undiminished means, and requested the plaintiffs to exhibit the same confidence in him as in himself. He was designated, too, as the plaintiff's successor in the firm name adopted. Could stronger language be used to express the substitution of Kanter for the defendant, with the same resources? To prevent any misapprehension, the defendant when interrogated, stated in most emphatic language that there was to be no alteration except in the firm. The possession of an old stock of goods and of borrowed money, for which he owed, certainly did not bear out this statement. Whatever, therefore, might have been the cause of Kanter's insolvency afterwards, and whether the defendant was instrumental in it or not, he was responsible for the truth of his representations, if he intended to and did procure credit for Kanter by their means.

The representations were not a letter of credit for a single transaction; they were operative as to all future purchases which they enabled Kanter to make, and the first payments may have been made as part of a system to lull the plaintiffs into false security. And *prima facie* evidence of the defendant's purpose may be found in his intermed-

Carpenter agt. Atherton.

dling in Kanter's business, brushing up his credit in 1860, and sweeping away his whole stock of goods within a year afterwards, for part of his claim.

I concur, therefore, in thinking the case was improperly withdrawn from the jury, and that a new trial should be had.

CALIFORNIA SUPREME COURT.

CARPENTER agt. ATHERTON.

In *California*, where a party enters into a written contract for the payment of a sum of money in *gold coin* of the United States,—such contracts being authorised by a statute of that state, he will be decreed to *specifically perform* such contract, and make payment in gold coin. And it is no defence to an action for such specific performance that the defendant has, before suit brought, tendered in payment to the full amount of his obligation, *United States legal tender notes*.

Sacramento, California, August 16, 1864.

CURREY, J. The defendant made and delivered to plaintiff his contract in writing, bearing date the 2d of April, 1864, by which for a valuable consideration he promised to pay to the plaintiff the sum of \$500, on demand, in United States gold coin. Some time afterwards, the plaintiff duly demanded payment of the sum of money due on this contract, in the kind of currency specified therein. The defendant refused to pay in gold coin, but subsequently, and before this action was commenced, tendered and offered to pay to the plaintiff certain United States notes, amounting in the aggregate to the sum of the principal and interest due to the plaintiff. The United States notes so tendered were issued under and in pursuance of an act of congress of the United States, entitled, an act to authorize an additional issue of United States notes, and for other purposes, approved July 11th, 1862. By this act the notes so tendered were made lawful money, and a legal tender in pay-

Carpenter agt. Atherton.

ment of all debts public and private within the United States, except as therein otherwise provided. The defendant, by his answer, pleaded the tender of these United States notes for payment of the amount due, and brought the same into court with his answer, ready to be paid to the plaintiff. The plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defence, and specified as causes of demurrer:

First. That the United States notes tendered are not money, and the plaintiff was not, nor is he by law, obliged to receive the same in payment of money due him.

Second. That by the contract on which the action was brought, the defendant promised to pay the sum of money due the plaintiff in gold coin of the United States, and the defendant does not aver a tender of the amount due in such coin.

The demurrer was sustained, and at the same time leave was granted to defendant to amend his answer, which he declined to do; whereupon the court ordered and adjudged that the plaintiff have and recover against the defendant, the principal and interest due, and the costs of the action, specifying the amount thereof, payable in gold coin of the United States. And it was further ordered and adjudged, that the plaintiff have execution to enforce the collection of such judgment, with the interest which might accrue thereon; and that such execution specify, direct, and provide that the judgment and all accruing interest thereon shall be collected only in gold coin of the United States. The defendant has appealed from this judgment, which brings up the case to be considered upon certain alleged errors that are assigned in a well drawn bill of exceptions, presenting the whole case upon its real merits. The exceptions taken to the rulings and judgments of the court, raise the question as to the validity of the act of the legislature in the state, passed on the 27th of April, 1863, commonly called the "specific contract law," in so far as its provis-

Carpenter agt. Atherton.

ions relate to the points involved in this controversy (*Laws* 1863, p. 687). The second section of this act provides that in an action on a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein.

The third section of the act provides that the execution to be issued on such judgment shall state the kind of money or currency on which the judgment is payable, and shall require the sheriff to satisfy the same in the kind of money or currency in which it is made payable, and that the sheriff shall refuse payment in any other kind of money or currency, and in case of the levy and sale of the property of the judgment debtor, he shall refuse payment from any purchaser at such sale in any other kind of money or currency than that specified in the execution.

It is a cardinal rule in the construction of statutes, that every reasonable intendment is to be made in support of their validity. (*Morris* agt. *People*, 3 *Denio*, 381; *ex parte McCollom*, 1 *Cowen*, 564; *Fletcher* agt. *Peck*, 1 *Cranch*, 87; *People* agt. *Supervisors of Orange*, 17 *N. Y. R.* 241.) But whenever it is clear that the legislature has transcended its powers in the passage of an act which is repugnant to the paramount law, it is among the most important duties of the judicial authorities to declare the invalidity of the act so passed. (*Adams* agt. *How*, 14 *Mass.* 365; *Fletcher* agt. *Peck*, 6 *Cranch*, 87.)

By the laws of the land the country is furnished with three kinds of money, gold, silver and United States notes, as media of exchange. Money made by the coinage of gold or silver, is a legal tender as prescribed by law, in the discharge of obligations which are to be satisfied by the payment of money in general terms. And we have held in *Sick* agt. *Faulkner*, and in other cases, that the notes

Carpenter agt. Atherton.

of the United States, issued by the authority of the laws of the national legislature, form a lawful money, and a legal tender in the payment of private debts. But it does not follow that every kind or any kind of money which by law is a legal tender in the payment of debts, may be tendered in satisfaction of every obligation capable of performance by the transfer and delivery of property in satisfaction of it. In *Sick agt. Faulkner*, we said upon good authority that gold and silver are commodities, the value of which is estimated by the value of other things, in the same manner as that of the latter is estimated by the value of gold and silver. This quality or character of the precious metals is not destroyed by their division into parcels bearing the impression of the mint, possessing a specific value ascertained and regulated by positive law. If one agrees generally to pay or deliver to another a given number of dollars, he may perform his contract by the payment of the specified sum in any kind of dollars which are recognized as such, and made a legal tender for the purpose by the law of the land, for by doing so he will fill his engagement according to its letter. But if he contracts, for a valuable consideration, to pay his debt in a particular kind of money, his obligation cannot be discharged in accordance with his stipulation, by payment in a different kind of money, and though by the unaided rules of the common law he could not be compelled to perform specifically that which he had promised, yet in morals, his obligation to do so is in no degree diminished. Courts of equity from an early period, have exercised jurisdiction, enforcing the specific performance of contracts, for the reason that the courts of common law though recognizing the obligation of parties to a contract to perform their respective parts of it according to its terms, could not afford this remedy to the party injured by the non performance of the other. At law, the party disappointed by the breach of the contract, was compelled to be satisfied with money as a substitute for the

Carpenter agt. Atherton.

thing for which he had contracted, and to which he was in justice entitled. The money recovered in such cases by way of damages, was considered as a substantial equivalent for the injury sustained by the breach of the contract, and upon this subject Judge STORY says: "It is against conscience that a party should have a right of election whether he will perform his covenant or only pay damages for the breach of it" (*Story on Equity Juris.* 717, a).

Contracts relating to real property, embraced by far the most numerous instances in which the jurisdiction of a court of equity may be invoked to administer the remedy of specific performance. But this species of remedy has not been limited to the enforcement in terms of agreements relating to lands. It has been in many instances extended to enforcing specifically contracts relating to personal property, and also to the performance of personal acts, though in such cases peculiar circumstances must exist to call forth the remedial agency of the court. The reason assigned for the universal exercise of this jurisdiction as to contracts respecting land, and not in relation to agreements concerning personal property, is not because of any distinction between realty and personalty, but because in the former case damages at law cannot be regarded as a complete and adequate remedy for breach of the contract, while in the latter a compensation in damages is deemed commensurate with the injury sustained; but whenever a violation of a contract relating to personal property cannot be correctly estimated in damages, or whenever from the nature of the contract a specific execution of it is indispensable to justice, a court of equity will not refuse its aid. (*Duff* agt. *Fisher*, 15 *Cal.* 381; *Willard's Eq. Juris.* 271, 280; *Fells* agt. *Reed*, 3 *Vesey*, 70; *Sullivan* agt. *Zuck*, 1 *Mary. Ch. Decisions*, 50; *Waters* agt. *Howard*, *Id.* 112; *Barr* agt. *Tapsley*, 1 *Wheat.* 152; *Philips* agt. *Berger*, 2 *Barb.* 608, and 8 *Id.* 128; *Stuyvesant* agt. *The Mayor of New York*, 11 *Paige*, 414, 427; *Story's Eq. Juris.* §§ 712, 720.)

Carpenter agt. Atherton.

The man who contracts to sell and convey lands, is under no greater obligation morally to perform his agreement than he who agrees for a valuable consideration received, to deliver to the purchaser personal property which he has sold, is to perform his. If there be any distinction between the two cases let the learned casuist resolve it, for if on this point we are in error, we need to be instructed.

The act of the legislature, by authority of which the judgment in this case was rendered, is remedial in its nature, affording to the party who may be justly entitled to the performance of the contract in terms, the means of enforcing it. The right to its enforcement is consistent with good faith, and with the dictates of a scrupulous and exact justice. Then is the legislature competent to provide for the creditor a remedy to compel his debtor to do what he has solemnly and deliberately bound himself to do? On this point there can be no doubt, unless the act under consideration is in derogation of the laws of congress making United States notes lawful money, and a legal tender in payment of debts. Upon the solution of this question our judgment must necessarily depend. Before a court duly appreciating the measure of its duty, will declare an act of the legislature invalid as contravening the laws of congress, a case must be presented in which there can be no rational doubt (*Ex parte McCollom*, 1 Cow. 564). For it is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void (*Fletcher agt. Peck*, 6 Cranch, 87). It is insisted on the part of the appellant, that as the acts of congress making United States notes lawful money, and a legal tender in the payment of private debts, is the paramount law, therefore such currency is adequate for the discharge of all debts which are to be satisfied by the payment of money. This is so, as we have already observed in respect to debts which are payable in money generally, but as to the con-

Carpenter agt. Atherton.

tract which is the foundation of the judgment in this case, it is more than a contract for the payment of money merely. It goes to the extent of defining by what specific act the contract shall be performed. By the admitted and settled rules of law, such a contract can be performed according to the agreement of the parties, only by the payment of the kind of money specified. Is there anything in law or morals opposed to such a contract? If not, what objection can there be to enforcing it in case voluntary performance is refused?

That a creditor may have uses for money of a particular kind, the acts of congress making United States notes lawful money, and a legal tender in the payment of debts, seem to have contemplated. He may have to pay duties on imports, and debts beyond the territorial communities where United States notes are the usual media of exchange, as verified by every day's experience. The importer of merchandise must have gold and silver money to pay the duties imposed by law on his importations. With such means only can he discharge his pecuniary obligations to the government. He must have metallic money for the purchase of such merchandise, because the paper currency of the government will not answer his purpose abroad. The importation of goods from foreign countries is a lawful trade, which congress under the constitution may regulate, and has, from time to time, regulated. By what means is the merchant who is engaged in this species of trade to provide for his necessities, that is, for the payment of his debts abroad, and his duties on imports at home, unless by securing payment from his debtors in the kind of money which he needs, and without which he must abandon the business in which he is engaged? Perhaps it will be answered that he must sell his goods for ready money, and not upon credit, and thus secure a price in gold and silver, and the purchaser from him must in his turn also sell for like ready money, in order to be furnished with the means

Carpenter agt. Atherton.

to pay the importer, and the consumer must also provide himself with the same kind of money, let it be derived from what source of industry it may, to pay for the goods he may need for consumption. If the owner of property may sell the same for metallic money, to be paid concurrently with the sale and delivery of it, we can see no reason why he can not sell for the same kind of money, to be paid at a future day. A sale on credit, is by the custom, and laws of the trade, recognized as legitimate, and is deemed to be consistent with good conscience and sound morals.

It is sometimes argued that the act of the legislature under consideration discriminates invidiously to the discrediting of United States notes. We are unable to perceive wherein. There is certainly nothing in the act itself that can justify such an inference. If such a charge were made against the act of congress making United States notes lawful money, and a legal tender in the payment of certain debts, it might be maintained with more seeming plausibility that congress itself has limited the uses to which the notes can be applied, and has provided expressly that in certain cases gold and silver money shall be used within the United States for the discharge of pecuniary obligations, and thus by implication at least, has recognized an existing necessity for the employment of gold and silver money for the excepted cases. But even in this we cannot perceive that any unjust discrimination is made between the different kinds of money. With the people of some countries trade can be carried on by the use of silver money with greater convenience and advantage than with gold coin, yet it cannot be said that the merchant who furnishes himself with silver for his purposes thereby discriminates to the prejudice of gold. The argument that the act in question unjustly distinguishes between metallic and paper money, if valid as an objection to contracts for the direct payment of a particular kind of money upon

Carpenter agt. Atherton.

credit given, is equally so as to sales made for the same kind of money paid at the time. It would be illegal to hold that the effect in the one case is more or less detrimental to the credit of United States notes than in the other. Arguments of the character which we have here noticed, are too obviously fallacious to require even the attention which we have devoted to their refutation. Again, the man of means, actuated by patriotic motives to aid the government, or for the purpose of legitimate investment, may desire to accumulate United States notes with the view of exchanging them for the bonds of the government, payable within the time, and bearing the rate of interest specified and provided in the act of congress. Is there, or can there be any good reason why he may not provide for the desired supply by receiving payment from his debtors in the kind of money that would serve his purpose? Is not the end which he seeks lawful, and are not the means legitimate to the end? The acts of congress relating to the national currency, comprehend all kinds of money, and the various provisions of these acts must be considered and construed *in pari materia*. By this course it will be readily and at once perceived that while United States notes are by the sovereign behest made lawful money, and a legal tender in the payment of debts, except in the instances specified, gold and silver money is equally, by force of positive law, a legal tender in the payment of all debts, and is also recognized as an indispensable currency for purposes to which government notes cannot be applied; and, therefore, the inference is logical if not inevitable, that congress did not design that these acts should interfere to prevent men from contracting for any particular kind of money which they might need.

Whatever, in the estimation of men engaged in monetary transactions, may be the difference in value between gold and silver money and the paper currency of the government of the same denomination, we cannot say judicially

Carpenter agt. Atherton.

that a gold or silver dollar is of greater or less value than a United States note of the same denomination, and we doubt if a case could be presented to a court of justice which would authorize evidence of a difference in the value of the two kinds of money. A court would be placed in an anomalous and absurd predicament in listening and giving heed to evidence designed to establish as a fact that one dollar is worth more or less than another (*Wood agt. Bullens*, 6 *Allen's Rep.* 516). By an act of congress of the United States, passed 1853, silver money, consisting of half dollars, quarter dollars, dimes and half dimes, issued in accordance with the standard of that act, was made a legal tender in the payment of debts in sums not exceeding five dollars. Now if A should loan to B one thousand half dollars coined under the act of 1853, and B should in consideration thereof, contract with A to pay the debt so created in like silver coin, would not a tender of the same kind of money in payment of the debt be a legal tender? No one, we apprehend, who understands the import of the word tender, would answer otherwise than in the affirmative. Then if the debtor in such a case could discharge his obligation by a voluntary performance of his promise, on what just principle could he escape it if he were so determined? The duties of the obligor and obligee in such cases must be reciprocal, and they should be commensurable. In the nature of things that which is lawful to tender on the one hand is lawful to demand on the other. (8 *Barb.* 821; 1 *Sim. & Stu.* 174 and 607; 2 *Ed. Ch. Rep.* 531; *Story's Eq. Juris.* § 723.) The act of the legislature under consideration is partly remedial in its nature. It creates no new right in the abstract. It does no more than add to the cases in which it is competent for the courts to enforce the execution of contracts specifically, and provides the means by which it can be done. In this the act is in harmony with the doctrines of equity jurisprudence relating to kindred subjects, and at the same time

Carpenter agt. Atherton.

it in no just sense contravenes the laws of congress making United States notes lawful money, and a legal tender in the payment of debts. It is alleged on the part of the appellant that the court erred in determining by judgment that the costs and disbursements of the action must also be paid in gold coin. The second section of the act provides that judgment for the plaintiff may follow the contract or obligation, and be made payable in the kind of money or currency specified therein. The plaintiff was entitled to recover his costs, which became a component part of the judgment, and payable in the kind of money specified therein.

The judgment is affirmed.

We concur, RHODES, SHAFTER, JJ.

SAWYER, J. I entered upon the consideration of the questions involved in this case, not without grave doubts as to the validity of the specific contract law; for when we held the act making treasury notes a legal tender in payment of all debts, public and private, to be constitutional, it seemed to follow as a logical consequence that if an agreement to pay a given sum of money in gold coin is a debt within the meaning of the law, then the debtor is entitled to discharge it by paying the amount called for in treasury notes; and this would be true in relation to all debts created generally, without any limiting or qualifying term in the contract creating the liability.

In such a case the law has given to the debtor his option to elect which kind of money made by law a legal tender he will adopt in discharging his liability. It is a right or privilege conferred on him of which he cannot be deprived except with his consent. But a right or privilege conferred upon an individual either by constitutional or statutory law may be waived by the party interested, unless such waiver would contravene public policy. Such is the case even in criminal law. Natural persons of full age, of sound mind, and under no recognized legal disability, are endowed

Carpenter agt. Atherton.

with an unlimited capacity to contract with other persons similarly situated, in all things except as to those matters which are against public policy, or prohibited by law. Gambling contracts, contracts for the payment of money in consideration of future cohabitation in a state of concubinage, and the like, are prohibited, as being contrary to good morals and the best interests of society. In some states usurious contracts are contrary to public policy, and prohibited. But there is nothing in a contract for a sufficient consideration to pay a given sum in gold coin or any kind of money, that is immoral or has ever been prohibited either expressly or by implication, and no policy against the making of such contracts has in any manner been indicated on the part of the government. The government has created three kinds of money, which it has provided shall be legal tender in the payment of debts—gold coin, treasury notes, and silver coin in limited amounts. But it has nowhere intimated in the remotest degree a preference for any one of these kinds of money over the others, or any desire that debts should be paid in any one rather than in the other, but has left it to the parties interested to act as their own interests may dictate. Neither so far as we have been able to discover, has there been any restriction placed upon the capacity or right of parties to contract, with reference to the several kinds of currency, or to other species of property other than is hereinafter specified. On the contrary, the law expressly recognizes contracts for the delivery of gold coin.

The act of March 3d, 1863, amending the act to provide for internal revenue, etc., provides that all contracts for the purchase or sale of gold or silver coin, or bullion, and all contracts for the loan of money or currency, secured by the pledge or deposit, or other disposition of gold or silver coin of the United States, if to be performed after a period exceeding three days, shall be in writing or printed, and signed by the parties, or their agents or attorneys, and

Carpenter agt. Atherton.

shall have one or more adhesive stamps, as provided in the act to which this is an amendment, etc., and no loan of currency or money on the security of gold or silver coin of the United States as aforesaid, or any certificate or other evidence of deposit payable in gold or silver coin, shall be made exceeding in amount the par value of the coin pledged or deposited as security, and any such loan so made or attempted to be made, shall be utterly void; and that all contracts, loans or sales of gold or silver coin and bullion, not made in accordance with this act, shall be wholly and absolutely void (12 U. S. Statutes at Large, p. 719, § 4). Here is an act of congress upon the subject of the purchase and sale of gold coin, which recognizes the validity of such contracts, and regulates the mode of making them. It only prescribes that in all cases where more than three days shall elapse between the time of making the contract and its fulfillment, the contract shall be written or printed, and signed by the parties, and shall have one or more adhesive stamps. Upon well settled rules of construction, all such contracts made in conformity with the provisions of this act, and also all contracts of sale and purchase not having three days to run are valid. This is the only limitation or restriction upon the power of persons to contract for the payment, or the sale and delivery of coin. When we come to a loan of currency or money on the security of gold or silver coin, or any certificate or other evidence of deposit payable in gold or silver coin, the law prescribes that the amount of the loan shall not exceed the par value of the coin. But no restriction as to the price is imposed upon the sale or the purchase, or any other dealings in coin. Of course, if contracts in regard to coin are permitted by law, these contracts must be valid, and the law contemplates that the contracts will be fulfilled according to their terms.

So also the act to provide ways and means for the support of the government, passed March 3, 1863, provides

Carpenter agt. Atherton.

that the secretary of the treasury is hereby authorized to receive deposits of gold coin and bullion with the treasurer and assistant treasurer of the United States, in sums not less than \$20, and issue certificates therefor, in denominations not less than \$20, each corresponding with the denominations of United States notes. The coin and bullion deposited for or representing the certificates of deposit, shall be retained in the treasury for the payment of the same on demand (*S. C. p. 711, § 5*). For the convenience of the people the government consents to become a depository of their coin when desired by the owner, and upon a deposit of gold coin the treasurer is authorized to issue a certificate of deposit to the owner, payable in gold coin. The coin thus deposited is not to be used, but is to be retained in the treasury for the payment of the certificate on demand. Why not pay it in treasury notes? Simply because it was deposited upon an agreement at the time that it should be returned in coin, and common honesty demands that the contract should be fulfilled. The government would get no coin deposited in its treasury upon any other terms. Hence when it undertook to become a depository of coin for its citizens, it was necessary to do as other bankers or persons receiving deposits do—enter into a contract to return the deposit in like funds. These certificates go into circulation in the place of coin, and become subjects of commercial and financial transactions. The government in these acts recognizes the propriety of such transactions, and why should not a banker in the absence of any law prohibiting such transactions, not receive gold coin on deposit, and when he has issued a certificate showing the fact, and in consideration thereof to repay the same in gold coin, not be bound by his contract? And why should not a party who has borrowed gold on the faith of his agreement to return the loan in like kind, be required to perform his solemn obligation? Good faith and good morals demand it. No law prohibits it, or prohibits making

Carpenter agt. Atherton.

such contracts. The government has made no discrimination through the law making power, in favoring one kind of money against another. It makes such contracts itself with the citizens, and expressly recognizes contracts between citizens for the purchase and sale of coin. The government also requires certain portions of its revenues to be paid in coin, and thereby imposes upon its citizens the necessity to procure it. No one disputes the right of a party to make all his business transactions upon a coin basis, and to refuse to part with any piece of property or perform any service, without requiring the coin in hand. If to meet the necessities imposed on him by government, or his convenience otherwise demands it, he may make a contract for coin to be executed by delivering it at the time the contract is made, why may he not make a similar contract providing for the anticipated emergency, to be executed in future, when the emergency arises? And if he make the contract, why is he not entitled to have it enforced according to its terms? We have seen that the act of congress permits a contract to sell and deliver gold coin at a future day. In what respect does an agreement for a sufficient consideration, to pay on some future day a given amount in gold coin, differ in principle from a contract to sell and deliver at a future day a like amount of gold coin? I can perceive none. The transactions in effect are substantially the same. Practically, the party who agrees to sell and deliver coin at a future day, does not agree to sell and deliver any specified piece or pieces of coin then in his possession, but he agrees to sell gold coin generally, relying on his ability to procure it when the time for its fulfillment arrives. A contract payable in coin is substantially the same thing. The only difference is in the form of expressing the contract, and not in the substance of the thing to be done. Such contracts do not appear at all to be against the policy of the law, for we have seen that the act of congress expressly recognizes,

Carpenter agt. Atherton.

and no where forbids them. Coin is lawful money. A party may lawfully pay his debts in coin. He may, at his election, waive his right to pay in anything else, either with or without consideration. The only question is when he shall exercise his right to make his election or waive his privilege, and when he has made his election, and inserted it as one of the essential terms and conditions of his contract, for full and adequate consideration, there seems to be no good reason in morals or public policy why he should not be compelled to abide by his election and the express terms of his agreement. Such contracts then are valid. But a contract to pay a sum of money in gold coin, and a contract to sell and deliver coin at a future day, create a debt in a general sense, and in that respect stand on the same footing, but they do more. The party agreeing to pay or deliver gold coin at a future day, not only creates a debt which he agrees to pay or discharge, but he also waives the privilege which the law would have guaranteed to him had he not voluntarily renounced it, and taken upon himself an obligation to pay it in a specific kind of lawful money, and nothing else. This waiver and obligation are essential conditions and parts of the consideration of the contract, without which we must presume the contract would not have been made. The agreement to pay in coin is as much a part of the consideration as the agreement to pay at all, and the presumption is that an ample equivalent has been received for the promise. The parties then are competent to contract; the contract is not against public policy; it is not prohibited by law, is payable in lawful kind of money, and is a lawful contract. But in case of a breach, independent of the statute, there was no adequate remedy. It was not one of the cases in which courts of equity were in the habit of granting relief. Although equity did grant relief upon breach of many but not all contracts in which the remedy at law was inadequate, and in a court of law the only remedy was in a suit for dama-

Carpenter agt. Atherton.

ges. But damages could only be estimated in dollars and cents, and in legal contemplation, whatever the facts might be in the commercial world, a dollar in one kind of money was equivalent to a dollar in another. Hence while in theory there was a remedy, practically it was inadequate. There are many other cases in which parties who suffer from breaches in their contracts are without adequate remedy. For instance, a merchant has a large amount due him, payable upon a given day, upon which he relies to meet his own obligations. His debtor fails to pay at the time, the merchant in consequence fails to meet his own engagements, is attached, his business is broken up, and ruin is the result. The measure of damages in such a case, in a suit against his debtors, is only the money due and interest, while the actual damages may be three times that amount. But this is the only remedy which the law affords. In such cases, and in many others, it would be impracticable to afford full relief. Many difficulties inherent in the nature of things exist, which conspire to prevent the granting of a full measure of relief, and the law affords that measure of relief only which experience teaches on the whole to be the most practicable, and to approximate as a general rule most nearly to doing substantial justice to all parties. But in the case of a contract payable in coin, an easy and practicable remedy may be applied to the breach of that branch of the contract requiring payment in a particular kind of money, by a judgment analogous to a decree in equity for a specific performance. In these cases our statutes afford the remedy by authorizing a judgment for the specific kind of money agreed to be paid, and directs the execution to follow the judgment, and the sheriff to sell property for, and receive in satisfaction of the execution, the kind of money only which is provided for in the contract and judgment.

I do not see wherein this law, which only affords a remedy for a breach of contract lawful in itself, is in any

Rieben agt. White.

respect in conflict with the act of congress making treasury notes a legal tender in payment of debts. A contract payable in money generally, is undoubtedly payable in any kind of money made by law a legal tender, at the option of the debtor at the time of payment. He contracts simply to pay so much money, and creates a debt pure and simple, and by paying what the law says is money, his contract is performed. But if he agrees to pay in gold coin, it is not an agreement to pay money simply, but to pay or deliver a specific kind of money, and nothing else.

For these reasons, in addition to those contained in the able opinion of Mr. Justice CUREY, I think the law relating to specific contracts valid, and that the judgment should be affirmed.

SUPREME COURT.

PIERRE RIEBEN, husband of ELIZA HICKS RIEBEN, deceased,
appellant, agt. HANNAH T. WHITE, and JOHN J. MERRITT,
administrator, &c., and others, respondents.

Where a married woman by the terms of a trust created for her benefit under a will, is to have the income of a certain fund and real estate during her life, for her sole and separate use, her husband has no vested right to, or interest in the income, or her savings out of the income during her life, although the marriage took place previous to the acts of 1848 and 1849. By such marriage he acquired no vested rights which could not be interfered with or taken away by his wife's will under these acts.

New York General Term, November, 1864.

Before LEONARD, P. J., BARNARD and SUTHERLAND, Justices.

APPEAL by plaintiff from a decree of the surrogate of the city and county of New York.

ALEXANDER W. BRADFORD, *for appellant.*

CHARLES O'CONNOR, *for respondents.*

Rieben agt. White.

By the court, SUTHERLAND, J. The trust property (the \$100,000 and the real estate on Broadway), to the income of which Mrs. Rieben was entitled under her father's will, was not vested in her in her life time, but in her brothers as trustees, and by the terms of the trust she was to have the income thereof during her life, for her sole and separate use. It cannot be said, I think, that her husband, by the marriage, acquired in her life time any vested right to, or interest in the income or savings out of the income, for in equity, the income and savings were protected from her husband and his creditors by the trust, and limitation of the income to her sole and separate use. (*Methodist Episcopal Church agt. Jacques*, 17 John. 548; *Molony agt. Kennedy*, 10 Simons, 254; *Proudley agt. Fielder*, 2 Mil. & K. 57.)

The last two cases which are referred to by the counsel for the appellant on another point, also show that even such part of the savings, or such property arising from the savings as may have been in the actual possession of Mrs. Rieben at the time of her death, whether cash, bank notes or chattels, was her sole and separate property, and as such, protected against her husband in her life time, equally with the savings or accumulations of the income in the hands of her brothers, the trustees, and which had never been paid over to her. It appears by the English cases that not only the post-nuptial, but also any ante-nuptial savings out of the income of the trust property, limited to her sole and separate use, would have been considered her sole and separate property, and as such would have been protected in her life time from her husband. (*Newland agt. Paynter*, 4 Myl. & Craig, 408, 417, 418; *Davies agt. Thorneycroft*, 6 Simons, 420; 2 *Story's Eq. Juris.* § 1384, 7th ed. and cases there cited.)

It appears from the return of the surrogate, that the clothing, jewelry, &c., specifically bequeathed by Mrs. Rieben, were purchased by her from the savings of the income limited to her sole and separate use; and that all

Rieben agt. White.

the moneys and securities in the hands of her administrator, with the will annexed, came from like savings. Except the \$50,000 over which she had the general power of appointment, it is to be inferred that Mrs. Rieben could not dispose of, and did not intend by her will to dispose of any property which did not arise or come from these savings. Probably it should be inferred from the return that these savings were all post-nuptial. It cannot be doubted if Mrs. Rieben had died without having disposed of these savings, or the property arising therefrom, by will or otherwise, that her husband on her death, would have been entitled in his marital right to such savings or property. (*Stuart agt. Stuart*, 7 *John. Ch.* 229; *Molony agt. Kennedy*, 10 *Simons*, before cited; *Ransom agt. Nichols*, 22 *N. Y. R.* 141; *Ryder agt. Hulse*, 33 *Barb.* 264; *S. C.* 24 *N. Y. R.* 372; *Knauth agt. Bassett*, 34 *Barb.* 31.)

Nor can it be doubted, I think, if her marriage had taken place subsequent to the act of 1849, amending the married woman's act of 1848, that Mrs. Rieben could have disposed of such savings or property by will under the acts, though her separate property, not by the acts but by the trust, and the limitation of the income of the trust property to her sole and separate use. But it is insisted on the part of the appellant, as the marriage took place before the amendment of the act of 1848 by the act of 1849, so as to give the power of devising, that by the marriage he acquired vested rights, which could not be interfered with or taken away by her will under the acts.

In my opinion the trust and the limitation of the income of the trust property to the sole and separate use of Mrs. Rieben, prevented his acquiring by the marriage any such vested rights in her life time, in or to her savings from the income by the marriage. I think the right which he did acquire by the marriage to succeed to the savings of her sole and separate income in case he survived her, and in case she did not dispose of them by will or otherwise, was

Rieben agt. White.

not and cannot be called a vested right, so as to raise the constitutional question. I think while the trust of the limitation of the income of the trust fund and property to her sole and separate use protected her savings from the income from her husband in her life time, and prevented him from acquiring by the marriage any vested right in her life time to or in the savings, the married woman's acts gave her power to dispose of them by will. I see nothing inconsistent in the two parts of this proposition. I think the cases of *Westervelt* agt. *Gregg* (2 *Kernan*, 305), and *Ryder* agt. *Hulse* (*supra*), do not apply, because the savings were the sole and separate property of Mrs. Rieben, by the trust, and the limitation of the income of the trust property to her sole and separate use. In *Ryder* agt. *Hulse* (33 *Barb.* 267), Justice Brown says: "The effect of the acts of 1848 and 1849 upon such estates (estates settled upon a married woman for her sole and separate use), is to convert the equitable into a legal title in the wife when there are no trustees, and when there are trustees vested with the legal title, to authorize a conveyance thereof to the wife, under the limitations prescribed in section two of the act of 1848. It results, therefore, from this view, that if the choses in action in controversy, or the money and property which they represented, were the separate estate of Elizabeth Ryder at the time the acts referred to took effect, the plaintiff has no title thereto which he can assert as against the bequest of the wife, because the act of 1849 expressly authorizes a married woman to convey and devise real and personal property, and any interest and estate therein, in the same manner and with the like effect as if she were unmarried." I see no reason to doubt the correctness of this view of the operation of the acts of 1848-49, as to the sole and separate estate or property of a married woman when the acts took effect.

My conclusion is that the decree of the surrogate should be affirmed, with costs.

Annett agt. Kerr.

NEW YORK SUPERIOR COURT.

ALEXANDER ANNETT, administrator, &c., respondent, agt.
THOMAS KERR, and others, appellants.

Where an *administrator* has been removed on the application of his sureties, after filing his account, and another administrator appointed in his place, the latter administrator cannot bring an action upon the bond of the former in his own name under the Code, as the real party in interest, to compel payment over of the funds belonging to the estate in his hands. The action on the bond should be prosecuted in the name of the people.

The *surrogate's decree* directing the assignment of the bond to the new administrator for the purpose of such prosecution, is without jurisdiction and void.

THIS was an action against the defendant Kerr, as administrator of John Strahan, deceased, and his sureties, on his bond to the people of the state, given on the issuing of letters of administration to him in 1858. It was conditioned "faithfully to execute the trust reposed in such administrator, and obey all orders of the surrogate of the county of New York, touching the administration of the decedent's estate." In January, 1862, such administrator applied to such surrogate finally to settle his account as such, and after the issuing and service of a citation on the parties interested, filed his account in April following. In June following (9th), exceptions were filed to such account on behalf of the widow and next of kin of the decedent. Some time between that time and the 13th of the same month, but when does not appear by the case, the defendant Kerr was removed as administrator, on the application of his present co-defendants (Terry and Thompson), his sureties on his bond. At the last date the plaintiff was appointed administrator in his place, and three days afterwards (16th June), applied to such surrogate by petition, to compel the defendant Kerr to render an account of his proceedings as administrator, and show cause why the assets in his hands as such, "should not be delivered over"

Annett agt. Kerr.

to the petitioner. In the beginning of July following, the attorneys for the plaintiff and the defendant Kerr, stipulated in writing to bring on the settlement of the matters involved in such petition on the 15th of that month, and the same attorneys with the attorney for a special guardian of one of the next of kin of the decedent, agreed to allow the account previously filed by such administrator in April, to stand as his account, and the exceptions filed thereto as exceptions of the next of kin and widow. A motion founded on such account and exceptions, for such decree as such surrogate might think proper to grant, noticed for the 16th of December following (1862), was made on the 15th of that month, without the presence of the defendant Kerr, or any one on his behalf. Such account as previously filed was then settled and adjusted by such surrogate, showing a balance in the hands of such defendant of upwards of eighteen hundred dollars. Such surrogate, by a decree containing such settlement as then made, ordered the defendant Kerr, after retaining a certain sum (\$165.57) for his commissions, to pay him a certain sum (\$54.50) for the costs and expenses of such proceeding, to the proctors for the special guardian before mentioned (Messrs. Mathews & Swan), a certain sum (\$200), and a certain other sum to the proctor for the wife and daughter of the decedent (\$100) for their respective costs, and the residue, being a little above thirteen hundred dollars, to the plaintiff. Proof of the service of such notice of motion consisted only of the recital thereof in the decree so made by the surrogate. Such decree was docketed in the New York county clerk's office, and an execution issued thereon to the sheriff of the same county was returned unsatisfied. The surrogate of such county in January, 1863, ordered such administrator's bond to be assigned to "the said John P. Crosby and others, for the purpose of being prosecuted," and in April following, he jointly with Messrs. Mathews & Swan, and Crosby,

Annett agt. Kerr.

executed a formal assignment of such bond under seal to the plaintiff.

MATHEWS & SWAN, for special guardian.

By the court, ROBERTSON, C. J. The bond in this case being to the people of the state, no action could be brought upon it at law as a bond, except when authorized by such obligees, in other words, by statute or equivalent authority. In a proper equitable case an action might perhaps be maintained upon it as a stipulation or judicial recognizance (*Carow* agt. *Mowatt*, 2 *Edw. ch.* 57), but then only by the officer in whose hands it is deposited (*Bolton* agt. *Powell*, 14 *Beav.* 2; *De G. M. & G.* 1), although even that has been doubted (14 *Beav.* 290, 291).

The complaint in this action, however, shows only the case of a revocation of the letters of administration of the defendant Kerr (without stating the cause), a decree against him on an alleged final accounting, and the return of an execution on such decree after docketing it unsatisfied. It also alleges an assignment by such surrogate of such bond to the parties in whose favor such decree was made (of whom the plaintiff is one), and the second assignment of it by them to the plaintiff. No special equity is, therefore, presented by such a case. It would seem that before the passage of the Revised Statutes, an action could be brought upon such a bond whenever any of its conditions were violated by parties prejudiced thereby (*People* agt. *Dunlop*, 13 *J. R.* 437), but only in the name of the people.

The first question that arises, therefore, is whether the plaintiff can bring an action in his own name under the Code on such bond, as the real party in interest (§§ 111, 113). The former mode of entering up judgment in a suit on a bond for the penalty in case of a breach, to stand as security for future breaches being abolished, it is difficult to say how the sureties can avail themselves in future

Annett agt. Kerr.

actions for breaches of such bond, of their payment of any money recovered by the present plaintiff in this. It would seem, therefore, that the action should have been brought in the name of the people, so as to make the parties in each successive action the same, unless by statute or a surrogate's decree the plaintiff acquired such an interest in the bond as to entitle him to bring an action in his own name.

The statutes of this state have, however, provided for every contingency in which it might be necessary to prosecute an administrator's bond, and regulated the prior steps for instituting an action thereon. The mere fact of so prescribing cases for such prosecution, would seem by implication to deny the right in all others. Unless the provisions of the Revised Statutes giving to letters of administration issued after the revocation of prior ones for the evasion by the administrator of personal service of a summons to render an account, or his remaining imprisoned a certain time for not doing so (2 R. S. 92, § 53), "the like effect" as it gives to those issued after a like revocation for omitting to file an inventory or avoiding service of a summons to compel it, also thereby gives the right of prosecution on such bonds, such statutes only expressly allow such right in the latter case (2 R. S. 85, § 21). The right of recovery in such prosecution was by such latter provision extended to unliquidated damages for any injury to such estate by any act or omission of such removed administrator, besides the value of any property unadministered. The whole amount as recovered, was to be assets in the hands of the new administrator (*Id.*). Probably on account of the restricted character of such provision, the legislature in the same year in which the Revised Statutes went into effect (1830), passed a law authorizing the surrogate to cause an administrator's bond to be prosecuted whenever he omitted to perform a decree for the payment of money, and to apply himself the moneys recovered to the

Annett agt. Kerr.

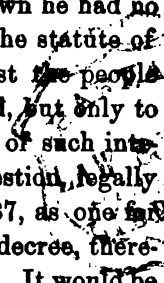
satisfaction of such decree (*Laws of 1830, ch. 320, § 23*), thus leaving the control of the proceedings with that officer. But such prosecution was still restricted to cases of decrees on rendering an account or a final settlement, or for debts, legacies or distributive shares (*Id.*). But in 1837, the legislature gave a cumulative and more extended remedy (*People agt. Guild, 4 Denio, 551*), in every case of a surrogate's decree against an administrator for the payment of money. (*Laws of 1837, p. 535, § 65; Laws of 1844, p. 90, §§ 1, 2.*) But the party thereby allowed to prosecute such bond was required to have prior thereto, an execution upon such decree docketed in a county clerk's office, returned unsatisfied (*Id.*). No such privilege was, however, given in either of the statutes of 1830 and 1837, merely upon a revocation, as was given by the Revised Statutes.

The right to prosecute such administrator's bonds at all in this case, if the statutory provisions just referred to are exclusive, as the surrogate's order is not sufficient unless based on proper proceedings (*People agt. Barnes, 13 Wend. 92; People agt. Corlies, 1 Sandf. R. 228*), must depend on the plaintiff's bringing it within the statutes of 1830 and 1837, since the revocation of the letters of the defendant Kerr does not appear to have been under the Revised Statutes, for omitting to render an account or to file an inventory, but by the recital of the statute of 1837 (*Ch. 460, §§ 29 to 32*), to have been on the application of sureties. This case does not come within the statute of 1830, before cited, because the decrees therein specified are only those upon rendering an account, a final settlement, or for a debt, legacy, or distributive share. And although a substituted administrator may call his predecessor to account (*2 R. S. 95, § 68*), extended by statute of 1837 (*Ch. 460, § 36*), yet such accounting is expressly excepted from the cases in which a surrogate is required to decree payment and distribution of assets on hand (*Id. § 71*), and appears to be only a means of discovery of the disposition of the

Annett agt. Kerr.

assets as in case of a creditor (*Id.* § 68; 2 R. S. 92, § 54), and merely auxiliary to some future proceeding, either by action on the bond, or a new application under the Revised Statutes (*vol.* 2, *p.* 92, § 52), by parties interested for a final account. Unless, therefore, the surrogate derived his authority to decree a payment by the defendant Kerr, of the assets in his hands to the plaintiff, from some other source than the right of the latter to an account, the decree was extra jurisdictional. Such case is in that event, equally without the statute of 1837. The sureties can only be made liable for the disobedience of the administrator to lawful orders of the surrogate.

But if the bond in this case could legally be prosecuted, the next question which arises is whether the plaintiff could prosecute it in his own name. That he could do only by some common law or statutory right, or the creation of an interest in him, either by the surrogate's decree or otherwise, entitling him to administer or retain the amount recovered (*Code*, § 111). I have already shown he had no such right, and the assignment spoken of in the statute of 1837, could not have been intended to divest the people of the state of their ownership of such bond, but only to give a right of suing thereon. The creation of such interest depends entirely upon the decree in question, legally bringing this case within the statute of 1837, as one for the payment of money. The validity of that decree, therefore, necessarily becomes a matter of inquiry. It would be a necessary subject of such investigation, notwithstanding the bond was free to be prosecuted, and in the name of the plaintiff, because the admissibility of such decree as evidence (conclusive or otherwise) is raised by the objection thereto, and the offer of evidence on the trial of this case to prove it erroneous. In actions under the statute of 1830 and 1837, before mentioned, the amount of the unpaid decree must be the measure of the recovery. In one under the provisions of the Revised Statutes, in case of a removal



Annett agt. Kerr.

of an administrator for not rendering an account or filing an inventory, the amount of recovery is left entirely open for inquiry in the court in which the action is brought. Unless the surrogate had jurisdiction, on an application by a substituted administrator for a final account by his predecessor, to compel the latter to pay over what was found in his hands, he clearly had none to determine the amount unless it was part of his general jurisdiction, or incidental to some branch thereof.

The jurisdiction of the surrogate's court, which is a creature of statutes, is essentially special and limited, both in the subjects over which it is exercised, and the mode of its exercise when that is prescribed (*Sheedon agt. Wright*, 5 *N. Y. R.* 197; *S. C.* 7 *Barb.* 39; *People agt. Barnes*, 12 *Wend.* 492; *Corwin agt. Merritt*, 3 *Barb.* 41; *Paff agt. Kinney*, 1 *Bradf.* 1; *Cleveland agt. Whitton*, 31 *Barb.* 544; *Farnsworth agt. Oliphant*, 19 *Id.* 30), and that too, notwithstanding the restriction upon the exercise of incidental powers imposed by the Revised Statutes (2 *R. S.* 221, § 1), has been removed. (*Laws of 1837, ch. 460, § 71; Sipperly agt. Baucus*, 24 *N. Y.* 46.) It is only, therefore, in case of the enforcement of the delivery by a removed administrator, of assets in his hands to his successor, being either a specially delegated power of a surrogate, or necessarily incidental to one, that he would have jurisdiction to make a decree such as that in question, so as to bind sureties on the bond.

The Revised Statutes confer on the courts held by surrogates, judicial power over eight enumerated subjects, which they declare are to be exercised in the cases and manner prescribed by the statutes of this state (2 *R. S.* 220, § 1), none of them except the third, fourth and sixth, having relation to an administrator's accounts or conduct, as they only relate to proving wills, granting letters, selling real estate, guardians and dower; such third and fourth thereof, however, are "to direct and control the conduct,

Annett agt. Kerr.

and settle the accounts of executors and administrators," and "enforce the payment of debts and legacies, and the distribution of the estates of intestates."

The eighth is of the most vague and indefinite, as well as general kind. "To administer justice in all matters relating to the affairs of deceased persons," which, however, as well as the authority to direct and control administrators, is after all, expressly limited to the cases and manner prescribed by statute (*Id*). If recourse be had to prior statutes of the state regulating the jurisdiction of surrogates, passed from 1787 to 1828, the powers thereby granted will be found to be, as they are ably summed up in the elaborate opinion of the acting surrogate *In re Brick's estate* (15 *Abb.* 12), comprised under thirteen heads. These include, besides those enumerated in the Revised Statutes and incidental powers, four others, to wit: 1. Taking oaths to accounts and inventories of executors and administrators. 2. Recording wills and other documents, and orders. 3. Investigating the disposition of the personal estate of decedents by strangers. 4. Compelling the production of documents and attendance of witnesses.

The enforcement of the delivery by a removed administrator, to his successor, of assets in his hands, cannot be said to be incidental to any of such enumerated powers. Such delivery would not facilitate, but if anything, rather impede the payment of debts and legacies, or a distribution while yet unascertained. If decreed, any payment of them could only be partial and inconsistent with a final accounting on the application of other parties interested. It would be unjust to deprive administrators or executors of their commissions when removed, for no fault but at the will of their sureties (*Laws of 1837, ch. 460, §§ 29, 32, 33*), and it would be equally unjust to deprive their successors of commissions for taking charge of the same fund, or to charge the estate with double commissions on it. Such litigation between the new and the old administrator would

Annett agt. Kerr.

settle nothing as between the latter and creditors, legatees or next of kin, either as to the amount due or freedom from all liability.

The new administrator may have a right to know how much of the estate is in the hands of his predecessor, in order to provide for debts and legacies on a final distribution, or for contingencies affecting the estate; but to order the payment to him in order that he may distribute it, is unnecessarily multiplying proceedings. All parties interested in the estate as creditors, legatees or next of kin, have a right to summon a removed administrator to account, and procure a decree against him, which, if unsatisfied, could be enforced in a suit on the bond. In case of a removal of an administrator for not filing an inventory, or for not rendering an account, it is very evident the statute does not contemplate a prior decision by the surrogate, since the extent of the recovery is designated. That such enforcement of a delivery of assets was not in this case incidental to the exercise of any enumerated power of the surrogate's court, is evident from the surrogate's failure to exercise any such power. The account of the defendant Kerr, as administrator, was not settled as regarded any creditor, legatee or next of kin. No debt or legacy was ordered to be paid, nor were the assets in his hands distributed. Such decree, therefore, so far as it ordered payment by the defendant Kerr, to the plaintiff, was void for want of jurisdiction.

If the account rendered by the defendant had been a final accounting, as it might have been if it had been made upon his application (2 R. S. 95, § 69), it would only have been conclusive of four facts (2 R. S. 94, § 65), to wit: 1. The correctness of the charges in it for moneys paid to creditors, legatees and next of kin, and for necessary expenses. 2. The extent of the liability of such defendant for interest. 3. The limit of the ability to collect debts stated in such account. 4. The correctness for allowances

Eyre agt. Beebe.

for decrease, and charges for increase in value of assets. As these are mostly in favor of the accounting party, it is evident that for other purposes, the settlement in the decree determines nothing as to the quality or value of assets collected or received, or the liability of the administrator for losses, which was therefore entirely open for new evidence. The plaintiff was bound to prove them, and the defendants entitled to introduce contradictory evidence.

Even, therefore, if the bond could have been prosecuted, and by the plaintiff in his own name, I am satisfied it was error not to have dismissed the complaint for want of sufficient evidence of the amount for which the defendant Kerr was responsible, and that evidence of payments by him to the next of kin and losses of money, should have been admitted; also, that the defendant Kerr was entitled to his wife's share. For these reasons, independently of the right to prosecute the bond, or bring this action in the plaintiff's name, I think there should be a new trial, with costs to abide the event. The plaintiff will then have an opportunity to apply to amend his complaint, if so advised, so as to make the case one of equitable cognizance, if it can be made so.

The judgment must therefore be reversed and a new trial had, with costs to abide the event.

SUPREME COURT.

EYRE agt. BEEBE, and others.

A cause of action in the nature of a creditor's bill, does not accrue until after the recovery of judgment and the return of execution unsatisfied, in the common law action. The statute of limitations, therefore, is not a bar to such an action until six years from the return of such execution.

Mere hindrance and delay is no objection to an assignment for the benefit of creditors. But if the primary and controlling purpose is to hinder and delay, then the statute is violated, and this may be the result even where the moral intention of the debtor is honest.

Eyre agt. Beebe.

Where debtors *stop payment* and close their business in consequence of a wide spread revulsion in trade, confident that with their assets they can pay all their debts, and do not then consider it necessary to make a general assignment for the benefit of their creditors; their *assignment of a portion of their assets* to a person for the avowed purpose of preserving it for their creditors at large, and to prevent any unequal advantage to creditors in other states, does not disclose any *fraudulent intent* in relation to their general assignment, executed nearly three months later.

It is not every kind of *interference* by an *assignor* with the property of the trust, that indicates a fraudulent intent at the execution of the assignment. Any suggestion offered by him which may be useful to the trustee, to the end that his property may go as far as possible in the payment of his debts and the satisfaction of his creditors, is the exercise of his moral interest in the disposition of his property which is justifiable.

Where a general assignment for the benefit of creditors provides "that the assignee shall retain, pay and disburse all the just and reasonable expenses, costs, charges and commissions of executing and carrying into effect the assignment, including a *just, reasonable and lawful compensation for his own services as such trustee*:" Such provision does not invalidate the assignment.

Where an assignment conveys to the assignee the partnership and the individual property of the assignors, with a direction to pay taxes, assessments, &c., to become due on the separate real property, such direction is not to be construed that such payments are to be made from the *partnership funds*.

A provision in such assignment that after payment of the partnership debts, the assignee shall pay all the *private and individual debts of each assignor*, is not an illegal provision. Even if it appeared in the assignment that each assignor was individually insolvent, and that the property assigned by each was *unequal in value*, and the debts of each *unequal in proportion*, still the presumption is that the assignee would do his duty and not pay the private debts of one partner with the property of the other, in the absence of any express provision to that effect in the assignment.

New York Special Term, December, 1864.

ACTION to set aside as fraudulent and void, an assignment for the benefit of creditors.

CREEKE, J. I. Without asserting that the statute of limitations is or is not properly pleaded, it is sufficient to say that the cause of action in this case did not accrue until after the recovery of the judgment and the return of the execution in the common law action against the defendant Beebe. The plaintiff could not commence this action until such proceedings were taken and consummated. He had no right to commence it, and, therefore, no right of action

Eyre agt. Beebe.

accrued. Six years had not elapsed from the return of the execution in the former action before this was commenced.

II. Did the conduct and acts of the defendant Beebe, before and at the time of the execution of the assignment, and subsequently to it, manifest beyond reasonable doubt an intent to hinder, delay or defraud their creditors? It is not sufficient to say that the execution of the assignment necessarily had the effect to hinder and delay them. If mere hindrance and delay should avoid an instrument of this nature, then of course it could in no case whatever be upheld. Every assignment in trust for the benefit of creditors operates to hinder or delay them in the enforcement of their claims. But as the law recognizes and upholds such a disposition of a debtor's property, when it is in other respects without taint, it is palpable that the mere effect of hindrance or delay cannot invalidate them. If indeed the primary and controlling purpose is to hinder or delay, then, undoubtedly, the statute is violated, and this will be the result, even when the moral intention of the debtor is honest, as when he thinks it would be better, that the property could be sold more advantageously for the interests of the creditors at a future time, and for this primary purpose executes an assignment. If this is the purpose which induces him to make an assignment, it will be set aside, but if his primary and controlling purpose is to preserve his property for such a distribution of it among his creditors as the law sanctions, the assignment will be upheld, although it operates also to hinder or delay. In the one case hindrance or delay is the main and primary purpose, in the other it is only an incidental effect.

On the 1st of September, 1857, the defendants Beebe, bullion brokers and bankers, stopped payment and closed their doors in consequence of the revulsion which so disastrously and widely followed the unexpected failure of the Ohio Life and Trust Company. But although they stopped payment for the time, they were confident that they had

Kyre agt. Beebe.

an abundance of assets to pay all their debts, and it appears to me they had reasonable ground for this belief. They therefore did not consider it necessary at that time to make a general assignment in trust, for the benefit of their creditors. But apprehensive that creditors in another state would levy attachments on their Trevorton coal stock, on the ground of non-residence, they assigned it on the 5th of September, 1857, to Mr. Colgate. They testify that their object in doing this was to preserve this portion of their property for their creditors at large, and to prevent any unequal advantage to creditors in other states. Whatever may be the legal effect of such an instrument as that, I cannot see that it discloses any fraudulent intent in relation to the general assignment, which was executed nearly three months later, on the 24th November, 1857. Indeed, if I can believe the witnesses, it had no reference whatever to the latter instrument, as in the beginning of September, I repeat, they had sanguine hopes of satisfying their creditors, without resorting to a general assignment. In like manner the sale of their bullion and the execution of the lease of their premises in Wall street, were made under the influence of the same hopes. Neither act was done in contemplation of making a general assignment, and, therefore, neither can shed any light on the intention by which they were guided in executing the latter instrument. In accordance with the hopes which they entertained of satisfying their creditors, without resorting to a general assignment, they received the \$50,000 from Trevor and Colgate, and as fraud is not to be presumed, and as there is not a particle of proof showing an improper appropriation of the money, it is right to suppose that they continued to appropriate it to the payment of their debts, until after the lapse of nearly two months, they found that numerous dealers who had borrowed money to a large amount from them, over \$700,000 on call, were utterly insolvent, and they had no longer any hope of paying all their creditors

Eyre agt. Beebe.

the full amount of their claims. They then resolved to make the general assignment, and handed over to their assignee \$8,000, the residue of the \$50,000 left in their hands. The other acts previous to the 26th November, 1857, are not, in my opinion, indicative of any fraudulent intent relative to the assignment executed upon that day, nor can I find from anything said or done by the assignors at the time of its execution or subsequently to it, indicative of such an intent. I see no proof, but on the contrary, a positive denial that they illegally interfered with the property after the assignment. Even if the printed circular which was produced before me at the trial was authenticated, and the connection of the assignors with it clearly proved, this would not show such an interference as would indicate a fraudulent intent at the execution of the assignment. Indeed, it cannot be justly said that every kind of interference by an assignor with the property of the trust has any such effect. Every insolvent debtor has at least a moral interest in the advantageous disposition of the property, in order that it may go as far as possible in the payment of his debts and the satisfaction of his creditors, and, therefore, any suggestion offered by him which may be useful to the trustee, and beneficial to the creditors, so far from showing that he intended by the assignment to defraud his creditors, indicates that he was actuated by good motives from the beginning, if we can at all ascertain a past intent by subsequent conduct. Undoubtedly an actual and continued change of possession of the assigned property is essential to show the good faith of the parties to the instrument, and if the assignors in the present case retained possession of the great bulk of the property, converted it into cash, continued to administer the business, controlled its management, and if the assignee as in the case of *Wilson agt. Ferguson* (10 How. 175), was a mere cypher, a fraudulent intent would have been inevitably proved." In the case under consideration, however, the

Byre agt. Beebe.

assignee did take possession, and continued in possession with a few trifling exceptions, of the assigned property. He was a veritable custodian and disposer of it; he alone managed and controlled it, and he alone communicated with the creditors in relation to it. The assignee Colgate, accounts satisfactorily why some small portion of the individual property of the assignors was not retained in his actual physical possession. A circumstance of this kind is not sufficient of itself to invalidate the assignment, particularly after the lapse of five years, during which time a considerable proportion of the trust has been in a state of liquidation, and many dividends paid. If this is the only evidence of bad faith, it should not have the effect of counteracting indubitable evidence of good faith. It is affirmed by the plaintiff's counsel, that the assignors designed by executing the special assignment and the lease of these premises in Wall street, to coerce creditors into a compromise. I cannot discover any evidence of such a design, or any attempt to put it in execution, either before or after the execution of the general assignment. As to the assertion that the assignee fails to account for \$137,000 of the proceeds of the assigned property in this action, he is not required to account for any portion of it except in a very general way, and no defalcation has been shown to affect the question of good faith in making the assignment.

III. If there are no extrinsic causes to authorize me to set aside this assignment, the next inquiry is, has it intrinsic defects which render it null and void? It is alleged that it provides for the assignee a greater compensation than the law allows. It provides "that the assignee shall retain, pay and disburse all the just and reasonable expenses, costs, charges and commissions of executing and carrying into effect the assignment, including a just, reasonable and lawful compensation for his own services as such trustee."

It would be an overstrained construction, to infer from this provision that it authorizes the assignee to retain or

Eyre agt. Beebe.

pay any one for services rendered to the trust, any more than the law strictly allows. If he should pay any more to others he will do so in his own wrong, and will be made liable for the amount in the accounting, and in the same accounting he will be debited for any amount he has retained for his own compensation, beyond the commission stated in the statute. This provision in the assignment allows him nothing more than to retain a reasonable compensation for his own services and for the services of others, all just and reasonable expenses, costs, charges and commissions. To suppose more than this would be presuming illegality in a provision perfectly susceptible of a legal intendment. The assignment authorizes and directs the assignee to pay all costs, taxes and assessments due or to become due on the real property conveyed, until the same shall be disposed of. The assignors convey not only their joint real and personal property, but each also conveys his separate property. It is contended that the authority to pay rents, taxes and assessments on the separate real property, authorizes the assignor to pay them out of the partnership funds. The language employed, perhaps, is not as direct and precise as it ought always to be in legal instruments. But like the provision relative to the compensation of the trustee, it does not necessarily import an unlawful meaning. It nowhere expressly authorizes the trustee to pay the rents, taxes and assessments on the separate property of either assignor out of the partnership funds, and there is no reason to imply an authority so manifestly illegal. There is no necessity that he should resort to the joint fund to pay these amounts. The charges upon each separate property must be kept down by the rents and profits accruing from it; it is to be supposed that these are at least capable of doing this, and in the accounting, the trustee will have to account separately for what he has received out of the separate property, and what out of the partnership property. And if by any ambiguity in the instrument, he

Eyre agt. Beebe.

has been induced to pay individual debts with partnership property, he will be compelled either to rectify his account or make good the deficiency in his account of the partnership receipts and expenses. The possibility of a mistake or misapprehension of the trustee will not warrant the total abrogation of the instrument.

The assignment provides that after the payment of the partnership debts, the trustee shall pay all the private and individual debts of each assignor. It is contended that this is an illegal provision, and that it is illegal as against the copartnership creditors. It is certainly not intended to affect them injuriously. Not only is the individual property of each copartner, in common with the copartnership property, assigned to pay copartnership debts, but it is expressly directed that no individual debts shall be paid until all the copartnership debts are paid in full. It is contended that this provision renders the assignment null and void, and I must say with JOHNSON, J., in *Turner agt. Jaycox* (40 Barb. 164), that this is a novel proposition. At least it was very novel to me until the counsel of the plaintiff directed my attention to some few cases maintaining a similar proposition. The furthest point in this direction which anything like reliable authority had previously reached, was that such a provision may avoid an instrument when it appeared upon its face that each assignor was individually insolvent, and that the property assigned by each was unequal in value, and the debts of each unequal in proportion. This proposition is based on the ground that such a provision is taking the property of one partner to pay the debts of another who had less property or more indebtedness. But I think even here there is a fallacy, for the assignee would not be bound to pay the debts of one assignor with the property of the other, unless the assignment contained an express provision to that effect. It would be presuming an illegal meaning to imply that the trustee was authorized to do anything more than to pay

Byre agt. Beebe.

the debts of each assignor out of his individual property alone. I rely again on the fundamental principle that in the absence of express direction we are not to imply an illegal intent. At all events, in the case before us, it only appears on the face of the assignment that the partnership was involved, and there is nothing to show either on the face of the instrument or in the proof, that either of the partners was individually insolvent. In the latter indeed, there is some proof to show that each owed some individual debts, but nothing to show insolvency. The few authorities to which the counsel for the plaintiff refers me, however respectable, are more than outweighed by authority equally respectable, and at least equally obligatory on me. Even if the authorities on this subject were equally poised, I would have recourse to elementary principles and the deductions of reason. "It was a principle of the Roman law," says Chancellor KENT, "and it has been acknowledged in the equity jurisprudence of Spain, England and the United States, that partnership debts must be paid out of the partnership estate, and private and separate debts out of the private and separate estate of the individual partner" (3 *Kent's Com.* 64, 65, *marginal*).

By the same principles of equity jurisprudence, it is expressly affirmed that the separate creditors are entitled in equity to seek payment from the surplus of the joint property, after satisfaction of the joint debts. This is precisely the disposition of the surplus of which the plaintiff complains. The assignment provides nothing more or less than what the elementary principle to which I have referred expressly sanctions, and to which the individual creditors of the assignors in this case would be entitled, even if the provision to which the counsel so strenuously objects was not contained in the assignment. Surely that which the law expressly allows and directs, even without any positive direction in the instrument, cannot become nugatory merely because it is expressly recited in it. This

Robinson agt. Hall.

in my humble opinion, would be a very extraordinary method of legal reasoning. It would be quite as illogical as to say that a provision to pay partnership debts out of partnership property makes void an instrument, because it is a principle of equity jurisprudence that partnership debts shall be paid out of partnership property. Having a priority in equity, it is wrong to make any disposition of the partnership property to secure and effectuate that priority.

My conclusions of fact are: 1st. Six years have not elapsed from the time the right of action in this case accrued until its commencement. 2d. That the parties to the assignment in trust executed on the 26th November, 1857, did not intend thereby to hinder, delay or defraud the creditors of the assignors.

My conclusions of law are: 1st. That this action is not barred by the statute limiting the time of commencing civil actions. 2d. That the said assignment contains no provisions affecting the validity thereof on its face. 3d. That the same is a valid instrument; and 4th. That the complaint should be dismissed, and judgment given for the defendants, with costs.

NEW YORK SIXTH DISTRICT COURT.

E. P. ROBINSON agt. WM. C. HALL.

An important mercantile decision, although arising in a justice's court. Where a loan of money in English currency, is made in England to be paid in New York, the pound sterling is to be estimated here at its real market value, and not at its par value.

THIS was an action to recover £6 lent in England, to be paid on the arrival of the parties in New York. The defendant paid in court \$30 (the par value), and claimed that was all the plaintiff could recover.

Robinson agt. Hall.

GEORGE W. WINGATE, *for the plaintiff,*

argued the following points :

First—That there was no statute limiting the plaintiff's recovery to the par value of the pound sterling.

(a) The only act which professed to fix its value for commercial purposes was that of February 9, 1793, which established its value at \$4.44. This is the act referred to when the legal par is alluded to. (*Story on Bills*; *Story on Conflict of Laws*, 491, § 308; *Brightly's Digest*, 154.)

(b) This act, besides having been held to have been passed for revenue purposes only (*Phillips agt. Ins. Co. of Pa.*; *Hall's Journal of Jurisprudence*, 250, 257), was repealed by the acts of June 28, 1834, and March 3, 1843, establishing the value of the foreign coins by weight, and repealing all inconsistent acts by the act of July 27, 1842, which established the value of the pound sterling for revenue purposes at \$4.84, and finally, by the act of February 21, 1857, which provided that the value of foreign coins should be estimated according to the annual report of the director of the mint.

(c) The director by his last report estimated the pound sterling at \$4.86.

Second—There being no statutory provision fixing the value, the plaintiff should recover the market value. The rule where the currency has depreciated being established that the creditor should recover sufficient to reimburse him in the country where he sues. (*Story on Bills*, § 418; *Chitty on Bills*, ch. 9, p. 433; *Dungannon agt. Hackett*, 1 *Eq. Case Abr.* 288; *Pardessus Droit Comm.* Tome 5, Art. 1495; *Smith agt. Shaw*, 3 *Wash. Cir. R.* 167; *Story on Conflict of Laws*, § 310, p. 494; particularly *Cockrell agt. Barber*, 16 *Vesey*, 461, 465; *Cash agt. Kennon*, 11 *Id.* 314; see *De Rham agt. Grove*, 18 *Abb.* 46.)

Third—The provisions of the legal tender act have no application. This act establishes the currency of the coun-

Robinson agt. Hall.

try, and the question here is, what is the value of £6 in that currency?

(a) It must be kept in mind that there is a great distinction between this case and those where the promise was to pay so many *dollars in gold*. There a paper dollar is made by law an equivalent for the debt, here the claim does not become a debt until *the value in dollars has been ascertained* by evidence, and then that amount may be paid in paper.

Fourth—This is a question involving the foreign credit of our mercantile interest, which will be destroyed if parties residing abroad can only recover their debts at *par*, paid in currency, that is one-half of their debt, or even less.

A. AIKEN, *for defendant*.

BARRETT, J. The plaintiff loaned the defendant £6 sterling, at Queenstown, and the amount was to be repaid in this city. There is no just distinction between a loan made in England and payable there, and a loan made there but payable here in English money. The intention here was that the plaintiff should receive back her £6 or its equivalent, in lawful money of the United States. What then is the value of the £6 in such lawful money? The testimony shows that six pounds sterling were actually worth in the market \$78, on or about the day when this debt was payable, and \$67 on or about the day of trial. The latter sum, is in my judgment, the true measure of damages, unless there is some statute or rule laying down a different rate. I have been unable to discover any act whereby the pound sterling is to be estimated at a fixed sum in our money for general purposes. The act of July 27, 1842 (*Dunlop*, p. 997), whereby all previous acts inconsistent therewith were repealed, fixed the value of the pound at \$4.84, in respect to all payments by or to the treasury, but not for commercial purposes generally. This

Robinson agt. Hall.

act was passed when foreign coins were yet a legal tender. By the subsequent act of February 21, 1857 (11 *Stat.* 163), all former acts declaring foreign gold or silver to be a legal tender in payment of debts, were repealed, and it was provided that the director of the mint should thereafter make an annual report of the weight, fineness and value of all foreign coin.

Thus it will be seen that even as between the United States and the importer, the value of the foreign coin is now the subject of regulation, based upon the annual report of the director of the mint. There being then no act upon the subject, the question is whether the par of exchange or the real rate should be the measure of damages? The latter is the only rule whereby exact compensation can be afforded to the creditor. It is equally just to the debtor, for the par may be greater than the real rate. I do not look upon the establishment of a par of exchange in the light of a legal rate or statute fixing the value. It is rather an agreed and conventional stand-point, to serve as a mere basis in estimating the actual value. It supposes the currencies of both nations to be of the precise weight and purity fixed by their respective mints, and it should not therefore be adhered to as a fixed rule of value where the currency of either country has become depreciated. (*Story on Conflict of Laws*, § 308, 309, *et seq.*; *Smith agt. Shaw*, 2 *Wash. C. R.* 157; *Grant agt. Healy*, 2 *Chand. Law R.* 113; 3 *Sumner*, 523.)

In the case last cited, Judge STORV, in delivering the opinion of the supreme court of the United States, reviewed and disapproved of the New York cases of *Martin agt. Franklin* (4 *John.* 125), and *Schofield agt. Day* (20 *John.* 102), and the Massachusetts case of *Adams agt. Cordies* (8 *Pick.* 260). The reasoning of Judge STORV is specially applicable to a debt payable in a foreign country, yet as previously suggested, I do not see any distinction between such a case and the present, and Judge STORV in his *Conflict of*

Dyckman agt. Valiente.

Laws, § 310, expressly illustrates the rule contended for by a case entirely parallel with the present.

Judgment for plaintiff \$67.

SUPREME COURT.

WILLIAM H. DYCKMAN, appellant agt. JOSE VALIENTE, and others, respondents.

Where several individuals subscribed for the stock of a *steamship company*, which, as alleged, never became legally organized, and the money paid in was all used to build a ship which was intended to be run for the benefit of the company; and where a majority of the subscribers organized a new *steamship company*, and registered the ship as belonging to it; and the latter company sold the ship and retained the proceeds,

Held, that the plaintiff, who was a subscriber to the *original company*, but was not included in the new company, was entitled as a stockholder, or at least as a partner, to an *accounting for the proceeds of the vessel*, from those of his fellow subscribers who had participated in its sale.

New York General Term, November, 1864.

Before LEONARD, P. J., BARNARD and SUTHERLAND, Justices.

APPEAL by the plaintiff from a judgment at special term dismissing his complaint.

HENRY A. CRAM, *for the appellant.*

I. T. WILLIAMS, *for the respondents.*

By the court, SUTHERLAND, J. After a careful examination of this case, I cannot avoid thinking that the pleadings were drawn and that the action was tried without any very definite idea of the ground or principle upon which the plaintiff had or claimed to have, a right to equitable relief. I am inclined to think that when the plaintiff rested, and the defendants moved to dismiss his complaint, he had presented on the pleadings and proofs a *prima facie* case for equitable relief, and it is very plain to me that his complaint should not have been dismissed on the ground it was

Dyckman agt. Vallente.

dismissed, which ground, as I read the case, was substantially that the property in the ship was in the parties as tenants in common; that no conversion or destruction of the ship having been proved, no action would lie by the plaintiff against his co-owners; that no act had been alleged or proved which entitled the plaintiff to equitable relief as a tenant in common. Now, in my opinion, there was no question of tenancy in common, or of joint tenancy, in the case.

As between Boardman, Holbrook & Co., as contractors for the building of the ship, and the plaintiff as the party with whom they made the contract, and as between them as such contractors and the first corporation, "The New York and St. Jago Steamship Company," no doubt the property in the ship was in Boardman, Holbrook & Co., until her delivery by them under the contract (*Andrews agt. Durant*, 1 *Kernan*, 35); but as between the plaintiff and such of the defendants as were officers or stockholders of the first corporation, "The New York and St. Jago Steamship Company," as between the plaintiff and such of the defendants as took or acquired their stock or interest in the second corporation, "The Cuba and New York Steamship Company," with notice or knowledge of the plaintiff's interest or rights in the first corporation, or of his rights as between him and the first corporation, or the stock subscribers of the first corporation, I think the property in the ship was in the first corporation. In looking at the case made by the pleadings and by the proofs, when the plaintiff rested and his complaint was dismissed, to see whether he was entitled to the equitable relief specifically asked for, or other equitable relief, as against all or any of the defendants, I think the property in the ship should be considered to be in the first corporation. I think the Judge at special term, on the pleadings and proofs, for all the purposes of the action, should have considered the title

Dyckman agt. Valiente.

or ownership of the ship to be in the first corporation, and to have been from the time of its organization.

I do not see why the first corporation was not regularly organized under the act. At all events, it appears to me that such of the defendants as participated in its organization, or subscribed for its stock, ought not to be permitted to allege any irregularity in its organization to defeat the plaintiff's equity. I think the question of equitable relief of any kind, and as to any of the defendants, was between the plaintiff either as a stockholder or creditor of the first corporation and such defendants. If so, the question of tenancy in common, or of joint tenancy, or of part ownership was not in the case, for a stockholder as such, cannot properly be said to have the interest of a tenant in common, or joint tenant, or of a part owner in the property, real or personal, the capital or capital stock is invested in during the life time of the corporation. If the plaintiff's position was that of a stockholder of the first corporation, or he had a right to be regarded as claiming relief as such, the opinions at general term and special term, in *Abbott agt. The American Hard Rubber Company* (33 Barb. 580), and the cases referred to in the opinions, will sufficiently illustrate the equitable ground or principle on which I suppose he was on the pleadings and proofs entitled to equitable relief, at least as against those of the defendants who were officers or stockholders of the first corporation, and who participated in the acts charged in the complaint, and the necessary effect of which was the destruction of his rights as such stockholder (*see also The People agt. The Albany and Vt. Railroad Co.* 24 N. Y. R. 261, and memorandum of the reporter at the end of the case).

I think that at all events, as to such defendants, the plaintiff was a stockholder in the first corporation, and had a right to be regarded as a stockholder to the amount of \$3,250, and probably to the whole amount claimed, particularly considering Baralt's letter from Cuba, the mortgage

Dyckman agt. Valiente.

by De Mier, the organization of the second corporation without consulting the plaintiff, the repudiation by the answers of any right of the plaintiff in the second corporation as a stockholder or otherwise, the registry of the ship (the only property of the first corporation) in the name of the second corporation, the offers by the plaintiff to show that subscribers to stock in the first corporation other than himself were in arrears, and his offer to show that the ship had been sold to the United States government by Baralt and his confederates, and the proceeds of the sale (\$200,000) divided between De Mier, Boardman, Holbrook & Co., and Baralt. I think the evidence offered to show that others of the subscribers to the first corporation (who are all defendants in this action), were in arrears as to their subscriptions for stock in the first corporation should have been received, as it would have tended to show that they ought not to take the position in this action that the plaintiff was not a stockholder in the first corporation, but was to be considered a mere creditor of that corporation, because he had not paid up his stock in full. I think, too, the proof as to the sale of the ship to the United States was proper, and should have been received, even if it was not necessary to show what relief and the extent of the relief which should be granted.

The very ground upon which the complaint was dismissed, may be said to assume that the plaintiff was or should be regarded as a stockholder in the first corporation; for he could not be a tenant in common without having an interest in the ship, and it was not pretended, and there was not a pretense for pretending that the plaintiff had any interest in the ship, except what came from his subscription for stock in the first corporation, and the payments he had made. Even if the plaintiff was to be regarded as a mere creditor of the first corporation, I am by no means prepared to say that his complaint could have been rightfully dismissed. The defendants, or some of

Dyckman agt. Valiente.

them, had got the only property of that corporation, or had put it in a position that he could not reach it at law. I think the case shows that this had been done in a way or by acts which must be deemed fraudulent to the plaintiff, even regarding him as a mere creditor of the first corporation. Nothing was left of the first corporation but its corporate name. A judgment and execution against it would have been fruitless. Possibly under the provisions of the act under which the corporation was organized, the plaintiff as a creditor of it might have maintained an action against one or more of the defendants as subscribers for stock in the first corporation, after judgment and execution against the corporation, but considering that none of the defendants demurred, but all answered, and that the question as to the plaintiff's right to relief as a creditor is prevented by the dismissal of his complaint, I do not think that it can be said that his complaint could have been rightfully dismissed, even regarding him as a mere creditor of the first corporation.

A court of equity has jurisdiction in all cases of fraud. In some cases of fraud courts of law have concurrent jurisdiction, and in many cases of fraud, it has been the practice or usage of courts of equity to decline to exercise their jurisdiction, but leave them exclusively to courts of law, but even in such cases it cannot be said that courts of equity have not jurisdiction. I am inclined to think that in the principal case, regarding the plaintiff as a mere creditor of the first corporation, the special term could not properly have declined to exercise its jurisdiction on the ground that plaintiff had a remedy at law, or had not exhausted his remedy at law.

My conclusion is that the judgment of the special term should be reversed, and that there should be a new trial, with costs to abide the event of the action.

LEONARD, J. The steamship was conveyed by taking out a register in the name of the Cuba and New York Steam-

Dyckman agt. Valiente.

ship Company, as owner, through the action of some or all of the other defendants, wrongfully, and in disregard of the rights of the plaintiff. Simonson did not in fact build the ship for that company, and in giving the builder's certificate, which entitled that company to take out a register, he but followed the directions of certain of the defendants whom he supposed authorized to direct him in respect to the vesting of the title to the ship, or obtaining the usual *indicia* of title. It was nevertheless the act of those who procured, directed or controlled the use or application of that certificate and the affidavit of Dr. Mier. Up to that time the moneys of the plaintiff, and of the individual defendants except Mier, had been used in constructing this steamship, and they who so advanced their money, were copartners in the adventure.

The act of causing the steamship to be vested in the Cuba and New York Steamship Company, or in excluding the plaintiff from his interest in her, was a conversion of the partnership property by some of the partners, in which all of them who have participated in the divisions of the funds or the proceeds of the sale, must be held to be bound either as actors or by ratification of the act. The plaintiff has been excluded from participation. He is entitled to an account as against these partners, or at least he may be so entitled, if the facts and positions above stated are finally borne out by the proofs on both sides, at the close of the case.

I am satisfied that the complaint was incorrectly dismissed, and that the plaintiff was then entitled *prima facie* to an account as against his partners, of the value of the partnership property converted by them, from which he was excluded.

The New York and St. Jago Steamship Company never went into operation, and seems to have but little to do with the case except as showing the intention originally, of those who were active in promoting the enterprise, and

Darlington agt. The Mayor, &c., of New York.

who conducted the operations of those who contributed to the adventure. This company never had any title or interest in the property created by the money of the individual contributors. The stock subscribed for was never paid in as capital. The money raised was paid out directly for construction, and not for shares subscribed for in the New York and St. Jago Steamship Company. The ship was built by individuals, not by a corporation. There was no person elected as president, or to any other office, and never a dollar of capital paid in, so far as it appears by the evidence. Proof of the amount in which the subscribers to the stock of the New York and St. Jago Steamship Company, other than the plaintiff, were in arrears in their payments, was not material, and the evidence offered on this point was correctly excluded. The offer to prove the sale of the ship to the United States government, and the price received, was wholly immaterial, except as the appropriation of the proceeds might be shown, for the purpose of establishing the participation of the defendants, who were partners in constructing the ship, in the proceeds of the sale, and thus showing their ratification of the proceeding whereby the plaintiff was excluded from the partnership property to which he had contributed.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

COURT OF APPEALS.

THOMAS DARLINGTON, respondent agt. THE MAYOR, &c., of
THE CITY OF NEW YORK, appellants.

The act of the legislature entitled "an act to provide for compensating parties whose property may be destroyed in consequence of mobs or riots," passed April 13th, 1855, is a valid and constitutional act of legislation.

Darlington agt. The Mayor, &c., of New York.

Judgments rendered pursuant to the provisions of that act, for riot damages, have the same force against the property of the city as judgments recovered for any other cause of action.

The property owned by the city corporation is held by it as a public corporation, and is subject to the law-making power of the state vested in the legislature.

THIS was an action brought under the riot act of 1855 (*Laws of 1855, ch. 428, p. 800*), to recover damages against the city of New York, for the destruction of the plaintiff's property by a mob, during the riot of July, 1863. At the trial before Judge MONCRIEF, the plaintiff was non-suited, but the general term (of the superior court) set aside the non-suit and ordered a new trial. The appeal was from that determination.

JOHN K. HACKETT and WILLIAM FULLERTON, *for the appellants.*

THOMAS DARLINGTON, *respondent in person.*

DENIO, C. J. I am of opinion that the act of the legislature under consideration did not require the presence of three-fifths of the members elected to each house in order to become a law. The constitutional provision on which reliance is placed, is in these words: "On the final passage in either house of the legislature of every act which imposes, continues or revives a tax, or creates a debt or charge, or makes, continues or revives an appropriation of public or trust money or property, or releases, discharges or commutes any claim or demand of the state, the question shall be taken by ayes and noes, which shall be duly entered on the journals, and three-fifths of all the members elected to either house, shall, in all such cases, be necessary to constitute a quorum therein" (*Const. Art. 7, § 14*). The article of which the section is a part, relates to the state finances, and taken together it constitutes the financial system of the state, so far as relates to constitutional restraints.

The affairs of cities and counties so far as they are regu-

Darlington agt. The Mayor, &c., of New York.

lated by the constitution, are treated in other provisions (see *The People agt. The Supervisors of Chenango*, 4 Seld. 317). This act of 1855 does not impose a tax of any kind either state or municipal. Its provisions may and no doubt will lead to the necessity of local taxation, and the same thing may be said of every act of legislature under which an expenditure for general or local purposes may in any contingency be required. If a local tax in a city or village is within the scope of the section, it will be sufficient to have the requisite quorum present when the law shall come to be voted. The act does not create a debt or claim. If no person should suffer damage by a riot or mob, no money would be required, and no debt or charge would ever be created, and until such an event shall occur, no debt or claim will be called into existence.

The legal principle which imputes the act of an authorized agent to his principal, does not apply to the rioters contemplated by the statute, whose wrongful act might lead to the incurring of a debt. They would not be in any sense the agents of the legislature. The constitution relates to legislative acts, which of themselves, or by their immediate and necessary consequence create a debt or claim. Nor is the act an appropriation bill in the sense of this provision. No public or trust moneys were disposed of or set apart for the purpose of being expended; it could not be known when, if ever, any payment of money would be required to be made, or in what county or city it would be required; and none of the public moneys of the state were to be expended in consequence of any of the provisions of the act. The other purposes included in the section are still more remote from, and indeed, have no relation to any provision of the act in question. Some of these positions were adjudged in the case referred to, and the others seem to be sufficiently plain.

The other objection is, that by force of the act, if it shall be executed, what is termed the private property of the

Darlington agt. The Mayor, &c., of New York.

city, may be taken for a public use without due process of law, and without a provision for compensation. It cannot be doubted but that the general purposes of the law are within the scope of the legislative authority. The legislature have plenary power in respect to all subjects of civil governments, which they are not prohibited from exercising by the constitution of the United States, or by some provision or arrangement of the constitution of this state. This act proposes to subject the people of the several local divisions of the state, consisting of counties and cities, to the payment of any damages to property in consequence of any riot or mob within the county or city. The policy on which the act is framed may be supposed to be, to make good at the public expense, the losses of those who may be so unfortunate, as without their own fault to be injured in their property by acts of lawless violence of a particular kind, which it is the general duty of the government to prevent; and further, and principally, we may suppose, to make it the interest of every person liable to contribute to the public expenses to discourage lawlessness and violence, and maintain the empire of the laws established to preserve public quiet and social order. These ends are plainly within the purposes of civil government, and, indeed, it is to attain them that governments are instituted; and the means provided by this act seem to be reasonably adapted to the purposes in view. If this were less obvious, the practice of the country from which we derive so many of our legal institutions, would leave no doubt on the subject. Laws of this general character have existed in England from the earliest period. It was one of the institutions of Canute, the Dane, which was recognized by the Saxon laws, that when any person was killed, and the slayer had escaped, the ville should pay forty marks for his death; and if it could not be raised in the ville, that the hundred should pay it. "This irregular provision," says an able author, "it was thought would engage every one

Darlington agt. The Mayor, &c., of New York.

in the prevention and prosecution of such secret offences" (1 *Reeve's History of English Law*, p. 17). Coming down to the reign of the Norman kings, we find in the statute of Winchester (13 *Ed. 1*, ch. 1), a provision touching the crimes of robbery, murder and arson—that if the country, i. e., the jury would not answer for the bodies of the offenders, the people dwelling in the county were to be answerable for the robberies and the damages sustained, so that the whole hundred where the robbery was committed, with the franchises thereof, should be answerable. It is upon this statute that the action against the hundred for robberies committed therein, of which so many notices are met with in the old books, is grounded. (*Reeve*, Vol. 1, p. 213; *Second Ins. ch. 17*, p. 569.)

Passing by the statutes of subsequent reigns, and particularly several in the reign of Elizabeth, in which this remedy has been somewhat modified while its principle is steadily adhered to, we come to the 7th and 8th, *Geo. IV*, ch. 31, which was an act for consolidating and amending the laws of England, relative to remedies against the hundred. It repeals several prior acts providing remedies against the hundred for the damages occasioned by persons violently and tumultuously assembled, and enacts a series of provisions very similar in effect with, and in some respects more extensive in their scope than those of the statute under consideration. As the hundreds were not corporations, the action was to be brought against the high constable, and on judgment being rendered, the sheriff was to draw his warrant on the county treasurer for the amount of the recovery. Ultimately, the money was to be collected by local taxation in the hundred made liable. These provisions have no direct bearing upon the present case, but are referred to to show that the action in question is based upon a policy which is coeval with the laws of England, and one which has been constantly acted on

Darlington agt. The Mayor, &c., of New York.

in that country, and hence that it very clearly falls within the general powers of the legislator.

As, however, the objection of the defendant arises out of a constitutional restraint, substantially identical with one of the provisions of *Magna Carta* (ch. 29), it is at least a curious coincidence that the policy of compelling a local community to answer with their property for acts of violence committed by others, has been considered by the English parliament as a supplement to rather than a violation of the great charter.

In the statute called *Articuli super cartam*, Anno 28, Edward I, which confirmed the great charter and the charter of the forest, and directed that the same should be firmly observed "in every part and article," it was directed in terms that the statute of Winchester, which gave a remedy against the hundred for robberies committed in it, should be sent again into every county to be read and published four times a year, and kept in "every point as strictly as the two great charters, upon the pains therein limited." (*Reeve*, vol. 2, p. 340; *Coke*, 2 *Inst.* ch. 17, p. 369.)

Assuming it to be sufficiently apparent that the statute in question falls within the general scope of legislative authority, the particular inquiry is, whether it violates the constitutional provisions relied on by the defendant. It is plain enough that the suits which it authorizes, will, if successful, result in requiring contributions from the tax payers of the local communities, to make good the losses of persons who have suffered from the acts of rioters. In that way it may be said that their property may be taken. In one sense it may be conceded that it is taken for a public use, for when the state undertakes to indemnify the sufferers from riots, the executing of that duty is a public concern, and the expenditure is on public account. It is a public use in the same sense as the expenditure of money for the erection of court houses and jails, the construction of roads and bridges, and the support of the poor. It is

Darlington agt. The Mayor, &c., of New York.

taken for an object which the legislature has determined to be of public importance, and for the interest of the state. Private property thus taken is not seized in the execution of the right of eminent domain. If it were so considered, all contributions exacted from citizens for defraying the expenses of the government and of local administration, would in order to be legal, require the return of a precise equivalent to the tax payers, or a compensation which would be absurd. Every one will at once see that this cannot be so, and that if it were government could not be carried on at all. But no general reasoning is necessary, for the subject has been elaborately considered and determined in this court.

In the case of *The People agt. The Mayor, &c., of Brooklyn* (4 Comst. 419), a local assessment made pursuant to an act of the legislature, for defraying the expenses of improving a street, was challenged on the same ground as the present act. The money of individuals having property in a certain locality was required to be taken and appropriated for the public purpose indicated; and it was argued that it was a taking of private property otherwise than by due process of law, and without any provision for compensation. The opinion of Judge RUGGLES, which was concurred in by all the judges, discriminates with great clearness between the seizure of property under the power inherent in the government to levy taxes for public purposes, and the taking of specific real or personal estate, either unlawfully or for a public object, without rendering a specific equivalent. In the former case, the contributors to the public burthens receive such compensation as the constitution of the laws contemplate they should have, in the benefits of good government, and in the advantage which the legislature have judged that they would receive from the particular expenditure in question. It is only necessary to add to this branch of the case that the legislature is the conclusive and final judge as to what the

Darlington agt. The Mayor, &c., of New York.

public interest and general good require to be done, and of the expenditure which may be needed for any particular purpose. The principle which of itself is sufficiently obvious, has moreover been repeatedly affirmed in this court. (*The Town of Guilford* agt. *The Board of Supervisors of Chenango County*, 3 Kern. 143; *Brewster* agt. *The City of Syracuse*, 19 N. Y. 116.) There can be no objection to imposing the burthens which shall arise in the execution of the act upon the local division where the riots took place and the losses occasioned. This is the case with all public exactions, which from their nature are local in their objects, and which generally arrange themselves under the head of town, city or county charges. If we look at the statute we are examining, as resulting ultimately in occasioning taxation, for the means of raising the money which will be required to carry out its purposes, the foregoing observations will be all which it seems to me necessary for the determination of this appeal, and I am of opinion that it should be considered in that light.

But it is contended that the application of the case to the city of New York raises a farther and different question. The fact that it is governed by a corporation under a charter, conferring certain municipal rights, does not of course, raise any distinction. The authority of the legislature prevails within the limits of chartered cities and villages, and the public laws have the same force there as in the other parts of the state. That position does not admit of an argument (*The People* agt. *Morris*, 13 Wend. 325).

The particular point appears to be that the form of the remedy for recovering the money required to pay individual losses, provided by the act, leads to consequences which would violate the constitutional provision. The party who has sustained damages by a riot may prosecute the city corporation, and the act provides that if he obtain judgment, the city treasurer is to pay the amount and charge it to the city. It is argued that it may happen that there

Darlington agt. The Mayor, &c., of New York.

will be no moneys in the treasury, or the treasurer may be unable or unwilling to make the payment, but the plaintiff having a judgment against the corporation, may cause an execution to be levied upon its property. The property of the city it is further argued, is private property, which the corporation holds by the same title as an individual or a private corporation, and that it is equally under the protection of the constitution. The effect of the act, as it is urged, therefore, is the same as though the property of one designated private citizen should be directed to be seized and appropriated to pay a local public charge. This it is plain could not be justified under the taxing power, as any other head of legislative authority.

The answer made to this argument in the printed opinion of the superior court, is that the method of collecting the judgment by application to the treasurer, is exclusive, and that property cannot be taken on execution upon such judgments. This answer is not entirely satisfactory to my mind. By permitting the party who had sustained damages to recover judgment in the ordinary course of justice, without any provision qualifying the effect of such judgment, it cannot, I think, have been intended to withhold from him any of the legal rights of a judgment creditor. The most universal of these rights is that of levying the amount of the judgment against the property of the debtor by the usual process of execution. If it were intended to exclude that remedy, it is difficult to see why a judgment should be permitted to be recovered at all. Without that effect the judgment would be illusory in many cases, for it would rarely if ever happen that there would be funds in the treasury adequate and applicable to the payment of such damages, where they should be for a considerable amount. My opinion is that the judgment is of the same force and efficacy as any other judgment which may be rendered against the city, subject perhaps to the duty of first presenting to the treasurer.

Darlington agt. The Mayor, &c., of New York.

It is plain enough that it would not be a judicious administration of the affairs of a city to permit its property to be subjected to a forced sale on execution, and hence it has become a usual practice to add to the sums included in the annual tax levy any amount for which judgments have been recovered against the corporation, and to authorize the borrowing of money, if necessary, in order to pay such judgments. Instances of such legislation occur in many of the recent statutes. (*Laws of 1863*, 411, § 6; *Laws of 1864*, pp. 938, § 1, 946, § 5.) A municipal corporation, equally with a private corporation, may have its property taken in execution, if payment of a judgment is not otherwise made. I am far from supposing, however, that such estate real or personal, as may by law or by authorized acts of the city government, be devoted to public use, such as the public edifices, or their furniture or ornaments, or the public parks or grounds, or such as may be legally pledged for the payment of its debt, can be seized to satisfy a judgment. Such clearly cannot be the case, for these structures are public property, devoted to specific public uses, in the same sense as similar subjects in the use of the state government. The argument that I am examining supposes that the city may possess other property held for purposes of income or for sale, and unconnected with any use for the purposes of the municipal government. Such property the defendant's counsel insists, and for the purpose of the argument I concede, is subject to be levied on and sold to satisfy a judgment rendered against the city corporation.

The true answer to the position that such seizure would be a violation of the constitutional protection of private property is, that it is not private within the sense of that provision. City corporations are emanations of the supreme law making power of the state, and they are established for the more convenient government of the people within their limits. In this respect, corporations chartered by the

Darlington agt. The Mayor, &c., of New York.

crown of England, and confirmed at the revolution, stand on the same footing with similar corporations created by the legislature. Their boards of aldermen and councilmen, and other officers, are as truly public officers as the boards of supervisors, or the sheriffs and clerks of counties, and the property intrusted to their care and management is as essentially public property as that confided to the administration of similar official agencies in counties and towns. In cities, for reasons partly technical, and in part founded upon motives of convenience, the title is vested in the corporate body. It is not thereby shielded from the control of the legislature as the supreme law making power of the state. Let us suppose the city to be the owner of a parcel of land not adapted to any municipal use, but valuable only for sale to private persons for building purposes, or the like. No one I think can doubt but what it would be competent for the legislature to direct it to be sold, and the proceeds to be devoted to some municipal or other public purpose within the city, as a court house, a hospital, or the like, and yet if the argument on behalf of the defendant is sound, it would be the taking of private property for public use without compensation, and the act would be void.

What has been actually done respecting such city property in the present case, if a judgment for riot damages has the effect which the argument supposes, and which I attribute to it, is to render it liable to sale or execution, to satisfy a liability of the city arising under the riot act; and this has been done under the express authority of the legislature. The vice of the argument of the defendant is, that it assimilates the condition of the city, in respect to the property to which it has title, to that of an individual or a private corporation, and denies to the legislature any power over it which it would not possess over the fortunes of a private citizen. I have stated my views in opposition to this theory in rather a dogmatic manner, but it has not

Darlington agt. The Mayor, &c., of New York.

been done without an examination of the cases which we have been referred to, and such others as have been within my reach, and as much reflection as I could bestow on the subject. I will state in a very brief manner the effect of these authorities.

In the case of *Woodward agt. Dartmouth College* (4 Wheat. 518), the particular question was whether the legislature of the state of New Hampshire was warranted in passing certain statutes, altering in many important particulars, the charter of the corporation of Dartmouth College, and assuming to regulate the execution of its corporate franchises according to its views of public expediency. It was claimed by the college that this legislation was prohibited by the provision of the constitution of the United States declaring the inviolability of contracts, and the answer to that claim was that the college was a public institution of the state of New Hampshire, and hence subject to the control of the law making power of that state. The main question, therefore, was whether it was a private or public corporation. The judgment was that although it was in a limited sense public, as an artificial being, existing by virtue of the laws, and in this respect partook of the public character which belongs to all corporations, yet when looking to the power of the state, it was to be regarded as a private corporation, such as a bank or manufacturing company.

It is not important to point out the manner in which this conclusion was reached, as the case is here referred to only with a view to the distinction between the two classes of corporations, and the authority of the legislature over them respectively. On behalf of the state of New Hampshire, it was argued that the prohibitory provision of the constitution should not be understood to comprehend the political relations between the government and its citizens, or offices held within the state for state purposes, or these laws concurring civil institutions, which it was said might

Darlington agt. The Mayor, &c., of New York.

change with circumstances, and be modified by act of the legislature. Chief Justice MARSHALL said, that the general correctness of these positions could not be doubted, and he added, "that if the act of incorporation be a grant of political power; if it create a civil institution to be employed in the administration of the government; or if the fee of the college be public property; or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its powers imposed by the constitution of the United States." But he held that so far from this, the college was a private eleemosynary institution, the body corporate possessing the whole legal and equitable interest, and possessing civil rights which were protected by the constitution. Mr. Justice WASHINGTON said, "that there were two kinds of corporations aggregate, viz.: such as were for public government, and others of a private character." "The first," he said, "are those for the government of towns, cities, or the like, and being for public advantage, are to be governed according to the laws of the land." These, he said, were mere creatures of public institution, created exclusively for public advantage. It would seem reasonable, he proceeds to say, that such a corporation may be controlled, and its constitution altered and amended by the government, in such manner as the public interest may require. Such legislative interference cannot be said to impair the contract by which the corporation was formed, because there is in reality but one party to it, the trustees or governors of the corporation being merely the trustees for the public, the *cestui que trust* of the corporation. (See *Story's Commentaries on the Con.* § 1, 387; 2 *Kent's Com.* 275.) The expression of Chancellor KENT here referred to, that where a municipal corporation is empowered to have and hold private property, such property is invested with the security of other private rights,

Darlington agt. The Mayor, &c., of New York.

is understood to mean only that it possesses such rights against wrong doers, and not that it is exempted from legislative control. These trustees or governors have no rights, interests, privileges or immunities, which are violated by such interference. Justice STORV, in the place cited, expressed himself to a similar effect, and mentioned towns, cities and counties, as instances of public corporations which were subject to legislative control. Similar citations from adjudged cases, and systematic works might be added, but it is presumed that the principle will not be questioned. The statutes of this state furnish instances too numerous for citation of the interference of the legislature with the corporate government of the city of New York. If the charter like that of Dartmouth College, was private and independent of legislative interposition, these acts would be void upon the principle of the judgment of the case cited, and the regulation of the government would be confined to the brief prescriptions contained in the charters of the colonial governors.

But it is not fair to impute to the defendant's counsel a position so extravagant. They rely upon a supposed distinction between the rights and powers of the corporation in the execution of what is conceded to be its political and municipal acts, and its title to, and its rights and powers over the property within its control. In respect to its powers, the corporate body is admitted to be the trustees of the people, represented by the supreme legislative power of the state, but in regard to its property it is argued that there are no beneficiaries. The property, it is insisted, is private, and hence the legislature has no legitimate control over it. If this is a sound position, the judgments which are every day rendered against the city for neglect of its corporate duties in respect to the streets and public places, and for the nonperformance of its contracts, and for other causes of action, not only cannot be satisfied out of the property of the city, but an act of the legislature which

Darlington agt. The Mayor, &c., of New York.

should require its sale and application to the payment of such judgments, would be the taking of private property for public use, without any provision for compensation, and would be illegal and void. The *sinking fund* which has been created by legislative authority to protect the public debt of the city would be an unconstitutional and a void creation. But in what sense can this city property be said to be private? It certainly does not belong to the mayor, or any or all of the members of the common council, nor to the common people as individual property (*Roosevelt agt. Draper*, 23 N. Y. 318). If one of these functionaries should appropriate it or its avails to his own use, it would be the crime of embezzlement, and if one of the people not clothed with official station should do the like it would be the offence of larceny. Should it be said that like all corporate property it belongs to the ideal being the corporation, and that its title is beneficial and not fiduciary, that answer would not avoid the difficulty. Indeed it would not be sound. A corporation as such has no human wants to be supplied. It cannot eat or drink, or wear clothing, or live in houses. It is the representative or trustee of somebody, or of some aggregation of persons. We cannot conceive the idea of an aggregate corporation which does not hold its property and franchise for some use, public or private. The corporation of Dartmouth College was held to be the trustees of the donors or of the youth needing education and moral and intellectual training. The corporation of New York, in my opinion, is the trustee of the inhabitants of that city. The property, in a general and substantial, although not a technical sense, is held in trust for them. They are the people of this state—inhabiting that particular subdivision of its territory—a fluctuating class, constantly passing out of the scope of the trust by removal and death, and as constantly renewed by fresh accretions of population. It was granted for their use and is held for their benefit. The powers of local government

Darlington agt. The Mayor, &c., of New York.

committed to the corporation are precisely of the same character. They were granted, and have been confirmed and regulated for the good government of the same public, to preserve order and obedience to law, and to ameliorate and improve their condition, and subserve their convenience as a community.

There are a few cases which countenance to a certain extent the views of the defendants' counsel, which will be briefly noticed. In *Bailey agt. The Mayor, &c., of the city of New York* (3 Hill, 531), an action was brought to recover damages against the city for an injury to the plaintiff's land in Westchester county, occasioned by the breaking away of a dam across the Croton river, which had been erected by certain officers called the water commissioners, under whose directions the great work of introducing pure and wholesome water into the city had been conducted. The allegation was that the dam had been unskillfully built. The legal question was whether the city was so connected with the work as to be liable for the wrong. The commissioners were appointed by an act of the legislature to report a plan of the work. This was to be submitted to the common council, and to be subjected to the vote of the electors of the city for their approval or rejection. It was approved, and the enterprise which included the building of this dam, was then carried on by the legislative commissioners pursuant to the acts, under the direction of the common council. At the circuit the judge held that the action could not be sustained against the city, and nonsuited the plaintiff. The supreme court set aside the nonsuit, and the opinion of the court prepared by Chief Justice NELSON, contains the doctrine on which the defendants rely. The learned chief justice stated the question to be in effect, whether the powers brought into exercise in constructing the work, were conferred for public purposes exclusively, in which case, he said, they would belong to the corporate body in its public, political or municipal

Darlington agt. The Mayor, &c., of New York.

character, or whether, on the other hand, those powers were conferred for purposes of private advantage or emolument. If the former were the true theory, he considered that the defendants were not responsible, but that in the latter case they would be, and he held that the defendants were to be regarded in respect to this work as a private company, like a bank or railroad corporation, and consequently that the corporation was liable for the negligence of the water commissioners. He conceded that there was in the enterprise a blending of public and private objects, which created some difficulty in the mind, but said that upon the whole the distinction was quite clear and well defined, and the power of separation practicable. He referred to a number of cases, commencing with *Dartmouth College agt. Woodward*, and including *Moodamay agt. The East India Company* (1 Brown Ch. Rep. 469), which last case he stated very much at large as defining the distinction very clearly, and being quite decisive upon the question. It was an action upon a lease, which the defendants had given to the plaintiff, permitting him to supply the inhabitants of Madras with tobacco for ten years, which it was alleged the defendants had illegally revoked, and had granted the privilege to another. The bill was for a discovery, but the general question was whether an action would lie against the company for such a cause, the defendants contending that the acts complained of were done in the exercise of their functions as a sovereign power. The master of the rolls admitted that a suit could not be sustained in that court against a sovereign power, but held that the principle did not apply to the case. He said that as a private company, the defendants had entered into a private contract, on which they must be liable. If the chief justice had adverted to the well known character of the East India Company, he would have seen that the case was quite inapplicable. It is a stock corporation, created for the purpose of trading with the native inhabitants of India,

Darlington agt. The Mayor, &c., of New York.

making regular dividends on the stock, and managing its pecuniary affairs through a board of directors sitting in London. In process of time, and probably at the period of this decision, it had acquired or been permitted to exercise, vast powers of government, which powers have since been transferred to a board of control appointed by the crown. As a trading company, it was and is a private corporation, conducted for the purpose of individual emolument, and is no doubt, liable on its contracts with individuals in the same manner as natural persons or private corporations. The lease was a contract for trading with the natives, which the company had violated, and it had thus subjected itself to damages as a private company. The other cases referred to in the opinion of the supreme court, have not any direct bearing upon the question under consideration. If this case of *Bailey agt. The Mayor*, had rested where it was left by the supreme court, though I should be obliged to acknowledge my inability to appreciate the distinction suggested between the public and private functions of the city government, the judgment would have been entitled to a certain weight as authority. But a new trial took place pursuant to a judgment of the supreme court, when the plaintiff recovered a very large verdict, and the case was presented to the court for the correction of errors, whose judgment of affirmance is reported in 2 *Denio*, 433. The chancellor and three senators delivered written opinions in favor of affirmance, and the president of the senate an opinion for reversal. None of the opinions even allude to the ground taken in the opinion of the supreme court. It was considered by all the members who delivered opinions for affirmance that public corporations were responsible on account of their legal personality, and their capacity for suing and being sued for the negligent acts of their agents and servants in the execution of their duties; and the main question which was much discussed, was whether the relation of principal

Darlington agt. The Mayor, &c., of New York.

and agent existed between the corporation and the engineers and others who constructed the dam, seeing that the water commissioners were appointed by the legislature. The chancellor was unable to make out that relation, and placed his opinion for affirmance on the ground that every owner of land who allows others to erect nuisances thereon, or suffers his premises to be in such a situation as to produce injury to others, is answerable for such injury; and as the city corporation were the owners of the land on which the dam was erected, he held they were liable upon that principle. Senator HAND considered the state as conducting the enterprise through the corporation, and said that a sovereign power, though it cannot be sued, yet if it become a member of a corporation, lays aside its sovereignty as to that transaction or character. Senators BOKER and BARLOW considered that the corporation, by their acceptance of the act of legislature, constituted the water commissioners their agent by adoption. The liability of the defendants being established by the court of ultimate review on an entirely different theory from that which affirmed the enterprise of conveying water into the city to be private work as distinguished from an act of municipal government, the doctrine of the opinion of the supreme court was substantially repudiated, and cannot therefore be considered as a precedent. It is but the opinion of the eminent chief justice and his learned associates, and does not, like a final adjudication upon the cause of action, settle any principle of law.

The case of *Britton agt The Mayor, &c.* (21 *How. Pr. R.* 251), was decided in the former supreme court in 1843, while the late Nicholas Hill was the reporter, but it was not published in his reports. After being often referred to in manuscript, to prove the private character of the property held by the corporation, it was finally printed in *Howard's Practice Reports*, fifteen years afterwards. It was an action brought on a contract between the plaintiff and

Darlington agt. The Mayor, &c., of New York.

common council, by which the former was to clean the streets in the city for a consideration agreed on. It was decided against the plaintiff on a demurrer to the complaint, on the ground that by the legal arrangement of the duties of the several branches of the city government, the work in question could not be made the subject of a contract, as such a method of proceeding would control or embarrass what is styled the legislative power of the common council. The soundness of that decision is not now in question, but in arriving at the determination, the chief justice took occasion to assert that many of the powers and privileges vested in the corporation were held by it as a private corporation, and that it held a mass of private rights and interests in property real and personal, in the same way that similar property was held by private persons, and the case of *Bailey agt. The Mayor, &c.*, was referred to as authority, that case not being then passed upon by the court of errors. So far as it was intended to assert that the management of, and bargaining respecting specific property owned by a municipal corporation, was substantially of the same character as that used by private persons and corporations in their transactions concerning similar property, the remarks were eminently just, and the assertion of that position was all which was essential to the argument of the opinion. That argument was, that the duty to provide for cleaning the streets was legislative in its character, and not properly the subject of contract stipulations, like arrangements which are made in the management of specific property owned by the city. There was nothing in this case which called for a determination as to the character of the ownership of such property, in respect to the distinction of public or private, or the power of the legislature respecting it. If any of the expressions of the chief justice can have the construction that such property owned by a municipal corporation is held, in all respects and in every aspect in which it may be viewed, or in

Darlington agt. The Mayor, &c., of New York.

regard to the legislative authority over it, precisely like that held by private corporations or individuals, the language is unguarded and cannot be sustained.

The case of *Benson* agt. *The Mayor, &c.* (10 Barb. 223), is a special term decision of the late Judge BARCULO, denying the plaintiff's application for an injunction restraining the corporation of New York from granting certain ferry franchises between the city and Long Island. The plaintiff claimed to have grants from certain commissioners appointed under an act of the legislature, passed in 1845, and who were thereby authorized to grant ferry licences between the city and Long Island, but they were not to grant a license for any ferry or ferries which should interfere with the rights, franchises or privileges of the mayor, aldermen and commonalty of the city of New York, in and to any ferries already established, &c. The injunction was denied, on the ground that the grant which the commissioners had made to the plaintiff did interfere with the ferries already established by the corporation, and which were hence regarded as in excess of the powers of the commissioners, and in violation of the statute. This decision of course does not touch any question before us, but the learned judge prepared a long and able argument to show that the corporation held rights in the subject of ferries, which the legislature could not control. It is not worth while to examine at length the positions of an opinion wholly aside from the point decided. Many of the positions are incontrovertible, such as the rights of grantees of the corporation of existing ferries upon the footing of contracts, protected by constitutional provisions. So far as the opinion argues that the legislature cannot interfere, with the power conferred by the charter on the corporation, in regard to ungranted ferries, I should not be able to concur in all that is said. Indeed, the judge refrains from pronouncing definitely upon that branch of the subject.

In the case of *The People* agt. *Hawes* (37 Barb. 440), a

Darlington agt. The Mayor, &c., of New York.

motion was made in the supreme court for a mandamus against the comptroller of the city, to compel him to pay the relator a large sum of money which had been awarded by arbitrators appointed pursuant to an act of the legislature, to determine what, if anything, they were entitled to receive from the city, for the breach of an alleged contract for the building of certain gate houses in the new reservoir of the Croton water works. The corporation had denied the legal existence of the contract, and refused to consummate it or to allow the relators to do the work, and the legislature thereupon passed the act in question, providing for an arbitration. The mayor joined in appointing arbitrators, but counsel for the city did not appear at the trial, upon which the award was made against the city upon an *ex parte* hearing. The special term denied the motion for a mandamus, on the single ground that it did not appear that the comptroller had any money of the city in his hands applicable to that object, out of which the award could be paid. On appeal to the general term, the order was affirmed. One ground of the affirmance, according to the opinions, was that if the relators had a demand against the city, there was a remedy by action, and that where such a remedy exists a mandamus will not lie. But the court, moreover, denied the power of the legislature to pass a law obliging the city to submit to an arbitration in such a case. That position was based upon the constitutional provision protecting private property, relied on by the defendant in the present case. If the transaction were between private persons, I doubt not but that this provision and the one preserving the right of trial by jury would have been fatal to the case. So if the corporation of the city had been a private corporation. But being public, and its charter and corporate franchises being subject to legislative control, I am of opinion that the legislature had a right of its own authority to create a board for the adjustment of the claim without the consent of the city. It

Darlington agt. The Mayor, &c., of New York.

may be that they could not compel private parties interested to submit to such a tribunal, for they had a legal right to prosecute the city in a regular action, but the legislature had full control over the city.

The subjects of the several actions in the cases I have been examining, were as clearly matters of municipal government as any which could be presented. Nothing could in the nature of things partake less of a private character than the supplying of water to, and the cleaning of the streets of a town containing nearly a million of inhabitants. If these are not public subjects and under the control of the legislature, the city is not subordinate to the supreme legislative power on any conceivable subject. It is an *imperium in imperio*.

Another case decided in a sister state, containing doctrines hostile to the views I have stated, may be mentioned (*Atkins agt. The Town of Randolph*, 31 *Verm.* 226). The legislature of Vermont, in a section of an act to suppress intemperance, had enacted that a county commissioner should be elected, and that he might appoint an agent for each town, to purchase liquors on its account, to be kept by the agent for sale for medicinal purposes, and all other selling of liquors were prohibited. One Mann, was appointed the agent for the town of Randolph, and in that character purchased liquors of the plaintiff on the credit of the town, but had betrayed his trust, in not paying over the proceeds of the sales made by him. The action was brought to recover against the town the price of the liquors so purchased. The court held the law unconstitutional, as a violation of the provision protecting private property, contained in the bill of rights, which was a part of the constitution, and was in similar terms with the provision of the constitution of this state so often mentioned. The opinion of course denies the right of the state legislature to make public regulations binding on the town without the consent of the inhabitants, which involve an obligation

Darlington agt. The Mayor, &c., of New York.

to pay money. It is opposed to the right invariably conceded here to make such regulations, and stands upon no principle. Its fallacy was exposed in an able dissenting opinion of one of the judges, which states the law upon the subject as I have endeavored to explain it (*see The People agt. Morris* 13 *Wend.* 325).

The foregoing are the principal cases bearing with any degree of directness upon the point whether specific property held by municipal corporations is subject to the law making power vested in the legislature, or whether it is protected against legislative action by the constitutional provision referred to. They have not in any respect shaken the opinion which I have above expressed. It is unnecessary to say whether the legislative jurisdiction would extend to directing the city property to other public uses than such as concern the city or its inhabitants; for this act, if the effect suggested is attributed to the judgment for riot damages, devotes the property which may be seized on execution to legitimate city purposes, namely, to reimbursing those who have suffered damages on account of the inefficiency of the city authorities to protect private property from the aggressions of a mob.

I am of opinion that the order appealed from should be affirmed, on the ground that the means provided by the statute to raise money to pay for the damages in question were not hostile to any provision of the constitution.

All the judges concurred, except DAVIES, J., who though for affirmance, dissented from some of the views of the chief judge, in respect to the corporate property, and INGRAHAM, J., who delivered an opinion for reversal.



Carpentier agt. Willett.

NEW YORK SUPERIOR COURT.

CARPENTIER agt. WILLETT, Sheriff.

Where the statute provides for *double costs*, it is unnecessary for an appellate court to mention them in their decision; and it is the duty of the clerk to tax them in the judgment.

The death of a party in an action cannot change the rights of the other parties; it merely changes the title of the action, and a revival in favor of the representatives is permitted for the purpose of protecting the interests of the estate of the deceased.

Where the defendant died in February, and the action was revived in March following, the *term fees* in the court of appeals for the March and June terms were properly taxable, as one notice for the year in that court is sufficient.

General Term, February, 1865.

MOTION for a readjustment of costs.

By the court, McCUNN, J. In actions where the statute provides for double costs, it is unnecessary that additional costs should be mentioned by the appellate court. It leaves no discretionary power, but provides absolutely for the amount of costs to be taxed (3 R. S. p. 908), and it remains only for the clerk to adjust the same, and include them in the judgment. And where the clerk refuses or neglects so to tax the costs, it becomes the positive duty of the court to compel him. The case of *Smith agt. Knap*, cited by counsel on behalf of the motion, does not establish a contrary rule. In that case the order of the court of appeals taxing the costs, was simply declaratory of the statute, and nothing more. The death of a party to an action, cannot, by any possibility, change the rights of the other parties; it merely changes the title of the action, and a revival in favor of the representatives is permitted for the purpose of protecting the interests of the estate of the deceased. And the court should render all its aid not only in the preservation of such rights, but in the protection of such an estate. Some objections are raised to

Smith agt. New York Consolidated Stage Co.

the term fees for March and June, because Mr. Willett died in February, and the action was revived in March. Cases in the court of appeals are only noticed once a year, and if his death had not occurred, no irregularity could have been complained of. The cause had been regularly noticed for the year, and no delay or injury resulted to the plaintiff, and I can find no reason why the term fees for March and June should not be allowed.

Motion for readjustment denied, with \$10 costs.

NEW YORK COMMON PLEAS.

HUGH SMITH and JOHN KERR agt. THE NEW YORK CONSOLIDATED STAGE CO., AUGUSTUS SCHELL, and others.

A receiver appointed by the court in an action, can apply to the court *ex parte* for instructions respecting the management of the estate confided to his care; but the better course is to give notice to those interested in the estate.

On such an application there seems to be no valid objection that the attorney for the plaintiffs in the action, appears as attorney and counsel for the receiver having charge of the defendant's estate. It is only when the receiver is acting *adversely* to one of the parties, that it has ever been supposed there was any impropriety in employing the counsel of the other.

It is no objection to the court giving instructions to the receiver, that another action is pending in *another court*, wherein the same receiver is appointed, if the appointment in the latter court is in fact *subsequent* to the appointment in the former court; and especially where the action in the latter is considered merely a colorable proceeding.

The right of the court to authorise a receiver to continue the business of the estate and property with which he is intrusted, is indubitable. But where it appears upon the application of the receiver for instructions, that the moneys arising from the prosecution of the business are insufficient to defray the current expenses, and that there are no other means to do so, the receiver will be directed to sell, and the court can vest him with discretionary power to sell all or any part of the property as he may think best, and either at public or private sale, as he deems most advisable; but all sales to be made on condition of being subject to the approval of the court.

Special Term, February, 1865.

APPLICATION by a receiver for instructions in regard to the management of the estate intrusted to him.

Smith agt. New York Consolidated Stage Co.

CARDOZO, J. This is a very simple matter. The application is the ordinary one of a receiver appointed by the court, petitioning for instructions respecting the management of the estate confided to his care. It might have been made and granted *ex parte*, although of course the wiser plan was to give notice (and undoubtedly the court would ordinarily require that to be done) to those interested in the estate. Whether, however, objections which may be termed of a technical character, should be entertained, may be a question, but it will not be necessary to consider it. Nor will it be requisite to examine whether, in any case, there would be any, and if so, what force in the objection raised that the attorney for the plaintiffs in the suit appears as attorney and counsel for the receiver. Whether any general practice ever existed, prohibiting such an appearance, or if there did, whether it ought not to be deemed obsolete, since it is certain that for very many years it has been disregarded almost daily, and thus seems to have met with the condemnation of the profession—and who could avail themselves of the objection, if it be one—are also questions which need not be determined, because it never was pretended that the rule applied to a proceeding like the present. It was only when the receiver was acting adversely to one of the parties, that it has ever been supposed there was any impropriety in employing the counsel of the other. That is not the case here.

It was also urged that this court should not give any directions to the receiver, but should leave it to the supreme court to instruct him. If it were necessary, I think I should have very little difficulty in reaching the conclusion that the suit of Siney against these defendants in the supreme court, in which Mr. Murphy has also been appointed receiver, was a colorable proceeding, not taken with a view to obtain the relief demanded, but with the design to enable the defendants to escape the consequences of a decision which had been announced in this case. Indeed, Mr. Siney

Smith agt. New York Consolidated Stage Co.

almost tells us so in his affidavit. But there is really no ground for this objection of the defendants. The order appointing Mr. Murphy receiver in the suit in this court, was properly made to relate back to the time when the decision that a receiver should be appointed was announced, and is prior to the appointment made by the supreme court (*see Deming agt. N. Y. Marble Co.* 12 *Abb. Pr. Rep.* p. 66). The case then presented for my consideration is simply this: The receiver, who by the order was to take possession and hold the assigned property, and the proceeds arising from conducting the business of the company, finds that the business is so unprofitable that it will not yield enough to bear its current expenses, and that the receivership has no other means to defray those expenses, and that the property which he was directed to hold is subject to liens to a large amount, which are becoming urgent. The receiver took the property subject to whatever liens were upon it, and those liens should be paid. (*In re North American Gutta Percha Co.* 17 *How. Pr. Rep.* p. 553; and 9 *Abb. Pr. Rep.* p. 70; *Rich agt. Loutrel*, 9 *Abb. Pr. Rep.* p. 356.)

The petition shows that except by sale, the receiver cannot discharge the liens; that he has no means of the company either for that purpose or to continue its business. One of the counsel for the defendants complained of the receiver for carrying on the business; denied that the receiver had been authorized to do so, and more than hinted a doubt whether the court had the power to confer such an authority. This complaint sounds singular when it proceeds from the counsel of those who attempted to transfer the property of the company to an assignee, and when that assignee had conducted the business for a considerable time. The right of the court to authorize the receiver to continue the business, is however, indubitable, and the cases are numerous in which the power has been exercised both by the late court of chancery and by the tribunals possessing

Smith agt. New York Consolidated Stage Co.

equity jurisdiction, since the abolition of that court. (*See Marten agt. Van Schaick*, 4 Paige, 479; *Crane agt. Ford*, Hopk. 114; *Jackson agt. De Forest*, 14 How. Pr. Rep. 81; *Dayton agt. Wilkes*, 17 How. Pr. Rep. 510; *Clark agt. Brooks*, decided by Judge BRADY in this court.)

I shall not stop to inquire whether the receiver has been so authorized in this case, because if he has been, it is clear on the papers before me that the concern cannot, and if he has not been, ought not to be kept going by him. It cannot be because there is a lack of means, and it ought not to be because it is apparent that it is a losing business.

It appears among other things, and is uncontradicted, that the moneys arising from the prosecution of the business are insufficient to defray the current expenses, and that there are no other means of the company to do so; that the United States authorities threaten to distrain for non-payment of revenue tax, and that the landlord of the stables threatens to dispossess for back rent. It is very easy to say, as was suggested on the argument, let the receiver get another stable, or make terms to hire the same premises from the date of his appointment. Even if these things were practicable, only one difficulty would be removed, and moreover, it does not appear how the receiver is to pay the rent either of other or the same premises from the date of his appointment, or any other time. But the landlord of the present premises may decline renting, and it may not be, probably is not, and at all events, without proof, it ought not to be assumed that it is always feasible to obtain premises suitable for stabling so many horses and vehicles. Even if it were proper for the receiver, or for the court to permit him to do so, to endeavor to hire the present stables without the means or the prospect of means to pay the rent, it is not too much to assume that the landlord, under the circumstances disclosed in this petition, would decline to let them. Whether the landlord can or not avail himself of the statutory remedy of sum-

Smith agt. New York Consolidated Stage Co.

mary proceedings as against the receiver, it would be monstrous to say to him "you shall, whether willing or not, make terms with the receiver to allow him to remain in possession of your property, though the rent is largely in arrear, and there is not the slightest possibility that he will be able to realize enough from the business to pay you."

None of the allegations of the receiver were denied, and I must frankly say, from what has transpired before me on the various motions in this case, I do not see how they could be. But it was suggested that possibly the company would pay the demands. It was not suggested that possibly the company would furnish the money to continue running the line, but had it been, the answers would be the same as to the suggestion just previously mentioned. If any of the stockholders designed to furnish the means either to run the line or to discharge pressing liabilities, it would have been very easy to have said so, and not leave it to be intimated by way of argument. That they have not done so is very strong proof that they did not and do not intend to do any such thing. The suggestion that possibly the company might furnish the means requires but a single remark. The assignment by the company to Mr. Schell, purported to convey everything it had, and all that was attempted to be assigned has been ordered to be transferred to the receiver. After having parted with everything, it is difficult to imagine where the company will find the means to carry out the suggestions of the counsel. The receiver finding things in this plight, asks the court what he shall do. The answer is inevitable, "you must sell." One of the counsel for the defendants, while not objecting to a sale, argued that I should order a reference to ascertain what should be sold.

I do not see that anything except to create additional charges on the fund, is to be attained by that course. How much the property will produce, and, therefore, supposing that it were unnecessary to sell all, how much would have

Sixth Avenue Railroad Co. agt. Kerr.

to be sold to pay liens, and whether the property would realize more if sold together than if sold in parcels, and the most discreet method of making the sale, must all necessarily be matters of opinion and speculation, on which judgments would be as diverse as there were witnesses examined. I think it quite as well to trust the judgment of the present receiver as that of a referee, and that, therefore, the wiser course is to vest, as I shall, a discretionary power in the receiver to sell all or any part of the property as he thinks best, and either at public or private sale as he deems most advisable, but all the sales must be made on condition of being subject to the approval of the court, and the receiver will make no disposition of the proceeds, except upon application to the court. This, it seems to me, will protect everybody.

SUPREME COURT.

SIXTH AVENUE RAILROAD COMPANY, appellants, agt. JOHN KERR, and others, respondents.

As a general rule, a court of equity will not restrain by injunction, the commission of an ordinary *tort* or *trespass*.

The threatened trespass must be such as cannot be compensated in damages at law, or it must be irreparable, to authorize an interference by injunction.

A preliminary injunction had been granted to prevent the use of the plaintiffs' road, and the defendants instituted legal proceedings to have the amount of compensation for such use ascertained, which were resisted by the plaintiffs.

Held, that the injunction should be dissolved, even though it should be conceded that the threatened use of the plaintiffs' road by the defendants would be technically a constantly recurring grievance, or a continuing trespass. At all events the injunction should be refused till the final hearing, when the subject of compensation can be considered.

The statutory privilege to use a railroad, it must be presumed, is granted from public motives and for the public good, and the public, therefore, must be presumed to be interested in the speedy and constant exercise of this privilege.

New York General Term, November, 1864.

Sixth Avenue Railroad Co. agt. Kerr.

Before LEONARD, P. J., BARNARD and SUTHERLAND, Justices.

APPEAL by plaintiffs from an order dissolving an injunction.

for appellants.

HAMILTON W. ROBINSON, *for defendants.*

By the court, SUTHERLAND, J. It is said (6 *Paige*, 98,) that a preliminary injunction before answer, is altogether a matter of discretion; if so, I am inclined to think that the dissolution of the injunction in this case on the complaint and answer, if not altogether a matter of discretion, was so much a matter of discretion, that the order dissolving the injunction should be affirmed on that ground.

But I will say further, that it is plain that the plaintiffs were not entitled to the preliminary injunction, on the ground that the threatened use of their road by the defendants would be a bare trespass or tort. The general principle or rule undoubtedly is, that a court of equity will not restrain by its injunction the commission of an ordinary tort or trespass. The threatened injury or grievance must be irreparable, or such as cannot be compensated in damages at law, to authorize a court of equity to interfere. (*Hart agt. Mayor, &c., of Albany*, 9 *Wend.* 571; *Jerome agt. Ross*, 7 *John. Ch.* 315.)

It was not, and is not pretended, that the defendants are not abundantly responsible, and able to respond in pecuniary damages, and it is clear that the nature of the threatened injury or trespass was such that it was susceptible of perfect pecuniary compensation. The threatened trespass or injury, therefore, was not irreparable by an action or actions at law.

If the plaintiffs had a case for a preliminary injunction, it was upon the ground that the threatened injury or grievance would be constantly recurring; that the threatened trespass would be a continuing trespass. Now considering that the use of the plaintiffs' road, which the defend-

Martin agt. Martin.

visions of the will in respect to the large fund which would necessarily accumulate in their hands from income. The directions contained in the will would, apparently, absorb but a small portion of the income. A trust is created usually for some express object, and is to be continued only till the object is attained, or the period limited therefor has expired. Here there is no object for a trust indicated, unless it be supposed that repairing the property is sufficient. But whether the testator intended to vest the estate in trust, or to create a power in trust for its management, it will operate only upon the shares of such of his children as were infants at the time of his death, and continue only as to each share during the infancy of the children respectively. By the second section of his will his whole estate passed to his children at the death of the testator. It would be inconsistent with this provision to hold that the title to any part of the estate was vested in trustees, and equally inconsistent with their rights as owners for the executors to exercise a power to sell, &c., after the children had reached their majority, except for the purpose of paying debts. The judge has found that there are no debts, except a very small amount, not equal to the amount of personal property. This fact seems to be sustained by the evidence. It is true one of the witnesses had heard of a large claim, but its existence as a debt was not proved. Under such circumstances it cannot be doubted that the children had a right to take and hold the land.

The testator appointed his executors the guardians of his minor children, and I think he intended them to act for their interest in selling the land, combining the exercise of the power to sell with their duty as guardians. All the children had, however, reached their majority before the testator died, excepting only his son Thomas. When this action was commenced, Thomas was over twenty years of age, and at the trial he wanted some three months only of his majority. It appears to be pretty clear that the defend-

Martin agt. Martin.

ants Andrew Martin and Peter Lynch, were not guardians of Thomas Martin, for the same clause of the will which appoints Andrew and Peter guardians, also appoints Thomas a guardian over himself. As to Thomas Martin, the guardianship was inoperative under this provision. But assuming that Andrew Martin had the power to sell the shares of Thomas under the directions of the will, the court has the power to control its exercise when a sale is manifestly opposed to the interest of Thomas.

The judge at special term, acting as *parens patriæ*, could determine from the facts proven whether it was for the interest of the infant that his real estate should be converted into currency. Why, it might be well asked, could Andrew Martin choose for the infant in this respect better than the judge? Has he more intelligence? Is he more disinterested? It cannot be doubted that the property of an infant in 1863, was safer invested in land than it would be if exchanged for the currency then in use. Whatever may be the answer to these questions, it is of very little practical importance to reverse the decision, even if it could lawfully be done, as all the children, including Thomas, are now of age, and the executors can no longer exercise the power of sale under the will. The exceptions taken to the refusal of the judge to admit evidence as to the habits of Thomas Martin, in respect to temperance, are of no moment, as the evidence was immaterial. The objection as to the admission of the written statement of the wishes of Thomas Martin in respect to the sale of the real estate, is not well taken. No argument can be urged against its admission except its want of materiality. If the evidence had been excluded, it does not appear that the judge could have arrived at any other decision of the case. The only conclusion to be drawn from this statement is, that Thomas thought very much as the judge did. As evidence, the statement had no operation. Probably the defendants acted honestly in their wish to sell, and in de-

Norton agt. Abbott.

fending this action. I think their costs should be allowed them out of the fund.

The judgment should be affirmed, and the costs of both parties on the appeal paid from the estate.

SUPREME COURT.

NORTON agt. ABBOTT.

In all cases where a party desires to examine his adversary as a witness under section 391 of the Code, the correct practice is to *propose an affidavit*, setting forth that the cause is at issue, and that the party desires to examine his adversary as to matters material to the issue, and upon such an affidavit *procure an order* for his examination. A mere *notice* served upon the party by the adverse party to attend and be examined as a witness, or an ordinary *subpoena* not sufficient.

New York General Term, February, 1865.

Before INGRAHAM, P. J., SUTHERLAND and CLERKE, Justices.

THIS was an appeal from an order made at special term in February, 1864, discharging the defendant from attendance as a witness. The plaintiff had commenced a suit by the service of a summons and complaint. The defendant had answered, and after issue joined, the plaintiff, with a view of examining his adversary as a witness under section 391 of the Code of Procedure, served a notice on the defendant, in the words following:

"To defendant: Take notice that you will be examined as a witness in this action, before the Hon. GEORGE G. BARWARD, one of the justices of this court, on the 18th day of February, 1864, at 10 o'clock in the forenoon, in the chambers of the justices of the said court, in the City Hall, in the city of New York, and that such examination will be taken by virtue of chapter six of the Code of Procedure. Dated New York, February 11, 1864.

Norton agt. Abbott.

"Yours, &c.,
"BUCKHAM, VAN COTT & BANGS,
"Plaintiff's Attorneys."

On the return day of the notice, the defendant appeared and moved that the same be set aside, and that the defendant be discharged from any further attendance upon the same. Judge BARNARD granted the motion. An appeal was taken to the general term.

BUCKHAM, VAN COTT & BANGS, *for the plaintiff,*

cited the case of *Cook agt. Bidwell* (17 Abb.).

AMOS G. HULL, *for the defendant,*

contended that an affidavit should have been presented to the judge, showing that the cause was at issue, and stating the material points in which the plaintiff sought to examine the defendant, and that upon such affidavit an order should be granted directing the defendant to appear. He cited *Green agt. Wood* (6 Abb. p. 277); *Bleeker agt. Carroll* (2 Abb. p. 82); *Cook agt. Bidwell* (17 Abb. p. 300).

Judge SUTHERLAND, who wrote the opinion in the case of *Cook agt. Bidwell*, held that there was nothing decided in that case dispensing with the necessity of an order for the examination of a party under that section, and that in all cases under section 391, the correct practice is to propose an affidavit setting forth that the cause is at issue, and that the party desires to examine his adversary as to matters material to the issue, and upon such an affidavit procure an order for his examination. That a simple notice to attend, or an ordinary subpoena was not sufficient.

INERHAM, P. J., and Clerke, J., concurred.

Niles agt. Maynard.

SUPREME COURT.

HENRY C. NILES agt. GEORGE L. MAYNARD, Sheriff, &c.

Where there has been no act of either party to delay a referee in making his report, and no order of the court *within the sixty days*, for further time, or notice given within that time of a motion for such order, it is the *absolute duty* of the referee to make and deliver his report within that time.

The statute says he *shall* forfeit his fees, and the action *shall* proceed as if no reference had been ordered, and by well settled rules of construction these words are *imperative*. Therefore, where either party, after the sixty days have expired, and no report has been made and delivered, take proceedings in the cause as if no reference had been ordered, and a report is thereafter made and delivered by the referee, it should be *set aside as invalid*.

*Fifth District General Term, April, 1864.**Before MORGAN, BACON and FOSTER, Justices.*

THIS is an appeal from an order made at special term on the 22d of April, 1863, upon a motion made on the part of the defendant to set aside the report of the referee therein, and any judgment that may have been entered thereon, and that said action might proceed to trial as though no reference had been ordered therein, on the ground that the referee did not make and deliver his report within sixty days from the time said action was finally submitted to him.

JAMES NOXON, *for plaintiff*.RICHARD RAYNOR, *for defendant*.

FOSTER, J. The facts established on the hearing were as follows: By a rule entered on the 6th of February, 1862, the cause was referred to Nathan F. Graves, as sole referee, to hear and determine the same. It was noticed for trial before the referee for the 15th of May, 1862, and was tried and finally submitted to him on the 21st day of May, 1862. Soon after the expiration of sixty days therefrom, the attorney for the defendant inquired of the referee if he had made his decision or report? and the referee

Niles agt. Maynard.

answered that he had not, and the defendant's attorney informed him that his powers as referee were at an end, and then noticed the cause for trial, and put it upon the calendar for the then next circuit to be holden in Onondaga county (which was the place for the trial), on the 15th of September, 1862. That circuit court was not held, but went down, and soon thereafter the defendant's attorney again noticed the action for trial at the then next circuit to be holden in said county on the 26th day of January, 1863. After such last mentioned notice of trial, and on the 10th of January, 1863, the referee made his report, and delivered it to the plaintiff's attorney, and on the 22d of January he served upon the defendant's attorney a bill of costs with notice of taxation, which was the first information the defendant's attorney had that the referee had executed or delivered his report; and at the January circuit the plaintiff's attorney opposed the trial of the action, and moved that it be struck from the calendar on the ground that it had been tried and a report made in favor of the plaintiff.

It appeared that the referee did not make and deliver his report within the sixty days, because he was called to the city of New York on business, and was there from time to time until after the sixty days had expired. The justice at special term, "*ordered* that the default of the referee be excused, and the said referee be at liberty to make his report within ten days after the service on him of a copy of the order," from which decision the defendant appealed to this court.

The amendment of 1862 to section 273 of the Code, so far as it is applicable to this case, declares that "unless the court shall otherwise order, the referee shall make and deliver his report within sixty days from the time the action shall be finally submitted, and in default thereof, said referee shall not be entitled to receive any fees, and the action shall proceed as though no reference had been or-

Niles agt. Maynard.

dered." The question arises, when can such order be made by the court? It is undoubtedly true that if one of the parties by stipulation, or any other act, induces the referee to delay the making and delivering of his report beyond the sixty days, and during such delay so caused by himself, proceeds with the action as if no reference had been ordered, it would be competent for the court on motion, to prevent such procedure, and allow the report to be made and delivered after the sixty days had expired; but where there has been no act of the party to delay the referee, and no order within the sixty days for further time, or notice given within that time of a motion for such order, I think it is the absolute duty of the referee to make and deliver his report within that time, and if he fails to do so he forfeits all right to his fees, his powers as referee are at an end, and the court has no power to continue such reference.

The word "*shall*," as applied to the action of the referee, as well as to the forfeiture of his fees, is in no sense permissive, but it is mandatory and imperative, and it is his duty, unless prevented in one of the ways above mentioned, to make and deliver his report within the prescribed time. To allow him for his own convenience, to delay his report beyond that limit, would not only continue the mischief which the amendment was intended to remedy, but would increase it, as the case under consideration exemplifies. The referee without any order from the court, and without the consent or fault of the defendant, allowed the sixty days to expire. The defendant's attorney then notified him that his powers as referee had ceased. He twice noticed the case for trial, and after that, and nearly six months after the expiration of the sixty days, a report is delivered, and he has notice that the plaintiff is proceeding to judgment upon it. He is compelled to make a motion to prevent it, and upon the hearing, an order is made "excusing the default" of the referee, and allowing him thereafter to make and deliver a report, thus virtually declaring the

Niles agt. Maynard.

proceedings of the defendant to be regular, and yet making no provision for the costs and expenses incurred by him in twice preparing for trial, and disposing of the motion without costs.

The referee was in default. The statute says, he *shall* forfeit his fees, and the action *shall* proceed as if no reference had been ordered; and by the well settled rules of construction these words are imperative. (*Attorney General agt. Lock*, 3 *Atkyns*, 166; *Stamper agt. Miller*, *Id.* 212; *Blackwell's Case*, 1 *Vernon*, 152, 153, and note 1, and *Morris agt. The People*, 3 *Denio*, 381.) The words "shall proceed as though no reference had been ordered," do not mean that the party shall be at liberty to move the court for leave to proceed, but that the cause shall be placed in the same condition as though it had never been referred. And surely in such case, no motion for leave to proceed would be necessary, but either party would be at liberty to notice it for trial.

In the special term case of *Livingston agt. Gidney* (25 *How. Pr. Rep.* 1), it is held that if the report is made after sixty days, and after notice that a party takes advantage of the failure to make it in due time, such report is irregular, though the court also holds that such report is not void; but I think the true construction of the statute is given in the case of *Litch agt. Brotherson* (25 *How. Pr. Rep.* 407), and *Foster agt. Bryan* (26 *How.* 164), and that as there held, either party after the expiration of the sixty days may take proceedings in the cause as if no reference had been ordered, and that after such step taken, a report is invalid, and should be set aside.

The order appealed from should be reversed, with \$10 costs of this appeal, and either party be at liberty to proceed in the action as though no reference had been ordered, and no report made therein.

BACON, J., concurred.

MOREAN, J., dissented.

Anonymous.

SUPREME COURT.

ANONYMOUS.

Motions to correct the calendar at the circuit, should be made on the *first day* of the circuit, which generally occurs on Monday. It is too late to make such motions on Thursday of the first week of the circuit.

Broome Circuit, Thursday of first week, February 23, 1865.

COUNSEL, who was engaged in two causes that were near the foot of the calendar, moved to correct the calendar by having such causes placed about the middle of the calendar, where they should have been inserted according to the dates of the issues in them with reference to the dates of the issues in the other causes. But Justice BALCOM decided that Thursday was too late to make a motion to correct the calendar at a circuit, and that such motions must be made on Monday, the day of opening the circuit. He said such had always been the practice, as he understood it, and that it was just to hold parties to this practice, for it is to be presumed that parties make arrangements on the first day of the circuit for trying their causes in the order they then stand on the calendar, after all proper corrections are then made, and that it would be unjust to parties who have been compelled to look after their causes, and have them reserved or postponed, or to be ready with witnesses for their trial, to permit causes below them to be placed above them on a late day in the circuit, when perhaps such a change of the calendar would have the effect to postpone causes placed below others by the change, to another circuit for trial. He concluded, for these reasons to adhere to the rule that requires counsel to make motions to correct the calendar on the first day of the circuit, and denied the motion to correct the calendar on Thursday of this circuit.

Wright agt. Sanders.

SUPREME COURT.

SAMUEL W. WRIGHT agt. JACOB SANDERS.

Where a referee in his report upon the issues tried before him, omits to state any *findings of fact*, the report and judgment entered thereon, and all subsequent proceedings are *irregular*.

And unless the defeated party chooses to waive the irregularity, he is entitled to have the judgment set aside, and to require that the referee in the first instance report the facts and the conclusions of law found by him.

Oswego Special Term, February, 1865.

MOTION on the part of the defendant to set aside report of referee in favor of the plaintiff, and the judgment entered thereon, and subsequent proceedings, on the ground of irregularity.

H. LINK, *for motion*.

HARDIN & BURROWS, *contra*.

FOSTER, J. The action was brought to recover for an injury sustained by the plaintiff, by falling in the night time, into a post hole which had been made on the lands of the defendant, or on the line of the road in front thereof, and a general denial, and various alleged defences were interposed on the part of the defendant. The issues were tried before a sole referee, who reported that "the plaintiff was entitled to recover against the defendant the sum of \$200 damages, as alleged in the complaint." And he ordered judgment accordingly, with costs, but he did not report any findings of fact, nor any conclusions of law, except as above set forth. Upon this report the plaintiff entered a judgment, and the defendant now moves to set aside the report, judgment and subsequent proceedings, for irregularity, but does not ask for costs of the motion.

The Code of Procedure as amended in 1851, directs that the referee "must state the facts found and the conclusions of law separately," and that "the report of the referee

Wright agt. Sanders.

upon the whole issue, shall stand as the decision of the court, and judgment may be entered thereon," &c. This language is too clear and explicit, as well as mandatory, to leave any doubt that it is the duty of the referee to report the facts found by him, and it is equally manifest that the legislature intended that such findings should form part of the judgment roll. It is true that the party against whom such a report is made, may waive the irregularity, and appeal from the judgment entered thereon, and may obtain the findings of the referee upon the settlement of the case made by him on the appeal, or the court on appeal in such case may hear the appeal, though no findings appear (*Snook agt. Fries*, 19 *Barb.* 313).

It is also true that where the referee finds the facts and conclusions of law separately, the judgment entered thereon is not irregular, although the findings do not contain all that they should do to present the true state of the case; and in such case the party desiring to do so may obtain the further findings in the way above pointed out. (*Dana agt. Howe*, 3 *Kern.* 306; *Johnson agt. Whitlock*, 3 *Kern.* 344, 348.) But where there are no findings of facts, unless the defeated party chooses to waive the irregularity, he is entitled to have the judgment set aside, and to require that the referee in the first instance report the facts and conclusions of law found by him. (*Church agt. Erben*, 4 *Sandf.* 691; *Van Steenburgh agt. Hoffman*, 6 *How. Pr. Rep.* 492; *Dake agt. Peck*, 1 *Code Rep.* 54; *Denny agt. Post*, 1 *Code Rep.* 121.)

The report and judgment are irregular, and must be set aside, with all the subsequent proceedings on the part of the plaintiff. And the referee upon the proofs and allegations already made and taken before him, must make a new report, stating all the material facts found by him, with his conclusions of law separately.

City Bank agt. Lumley.

NEW YORK COMMON PLEAS.

CITY BANK agt. MORRIS LUMLEY, and ten other cases.

Where a defendant in moving to discharge an *order of arrest*, predicates his motion on the plaintiff's *affidavits*, and to which he presents a response, he waives his right to object that the plaintiff's affidavits are *entitled in the cause*.

The laws of 1863 (p. 449), confers generally the authority to administer *oaths and affirmations* to be read in evidence and used in any of the courts of this state, without prescribing any particular *form of authentication*. And it was not the intention of the legislature to impose upon *Vice Consuls* duties in respect to this subject not imposed upon others.

Therefore, where a jurat to an affidavit is in the usual form, and states that the deposition was subscribed and sworn to in the presence of the Vice Consul of Canada, and he so certifies under his seal of office, it is sufficient.

The *arrest* of a person here in a civil action, for fraudulent representations in the purchase of property in a *foreign country*, of a foreign creditor, will be held good, where such property or its proceeds are brought here by him, although he could not have been arrested for such acts in that country. The *lex fori* and not the *lex loci* governs in such cases.

Affidavits to procure an order of arrest stating the material facts upon *information and belief* are sufficient, where they state the sources from which the information is derived, and the places of residence of the informants at such distance that it would be impracticable to procure their sworn statements in season to make a successful arrest. Especially where they contain positive and truthful statements enough to make out a *prima facie* case for arrest.

Where the evidence produced for an order of arrest is satisfactory that the large credit a debtor enjoyed just previous to his sudden failure, was used fraudulently to obtain a large amount of property, the fruits of which he might enjoy to the detriment of his creditors, an order of arrest should be granted by the judge and retained by the court.

General Term, February, 1865.

Before DALY, BRADY, and CARDOZO, Judges.

APPEAL by plaintiffs from an order at special term discharging defendant from an order of arrest.

ARTHUR & GARDNIER, *for plaintiffs.*

JAMES R. WHITING, *for defendant.*

By the court, BRADY, J. In these cases, the defendant feeling aggrieved by the orders of arrest, moved to discharge them. The order to discharge was granted upon

City Bank agt. Lamley.

the orders of arrest, the affidavits on which they were granted, and affidavits and papers annexed on the part of the defendant. The defendant succeeded on his motion, and the orders of arrest were discharged upon two grounds—first, that the affidavits on the part of the plaintiffs were on information and belief, and were not in conformity to the case of *De Weerth* agt. *Feldner*, decided in this court, and reported in 16 *Abb. Pr. Rep.* 295; and, secondly, because the judge at special term, on the whole case could not say that the defendant obtained the property purchased by him with the fraudulent intent not to pay for it. The presiding judge seems to have arrived at that conclusion, however, as will be seen, upon rejecting affidavits which he thought could not be considered. The plaintiffs' appeal from the order discharging the orders of arrest and the defendant, presents on the appeal objections in their nature preliminary, which must be passed upon before considering the basis of the opinion delivered at special term. They are as follows:

1. That the affidavits on the part of the plaintiffs being entitled in an action which was not pending when they were made, are nullities.
2. That the affidavits were altered after they were sworn to, having been originally prepared and sworn to for the purposes of being used as the exigency of the case or proceeding might require.
3. That the affidavits sworn to before the Vice Consul in Canada, were not properly authenticated.
4. That the alleged fraud was not committed within the jurisdiction of this state, or the United States; that all parties are foreigners, and that our statute relative to arrests does not apply to such cases.

I have not referred to the specific objection to the affidavit of Mr. Brown, for the alleged mistake in the venue, nor shall I consider it. In the view which I entertain of this case, that objection is too trifling to be considered at

City Bank agt. Lumley.

all. In reference to the first objection there are several answers.

1. It appeared that all the objections recited were taken on a previous motion made in the case of the City Bank against the defendant, and were overruled by the presiding judge, the motion to discharge the order of arrest having been denied, with liberty to renew; and the defendant has availed himself of the liberty given.

2. The effect of entitling an affidavit to hold to bail, though said to be a nullity, has never been so declared in any case involving the question which I have been able to find after diligent search. In the case of *Milliken* agt. *Selye* (3 *Denio*, 54), Judge BRONSON has collected certain cases in this state and elsewhere. The affidavit in that case, however, was one required to be made by the plaintiff, or some one on his behalf, and delivered to the sheriff with the writ of replevin. None of the decisions in this state, referred to by Judge BRONSON, involved the question. They are cases of *certiorari* and *mandamus*, or where the affidavits were defectively entitled. The English adjudications show the practice to be one which fluctuated until finally settled by a rule of the king's bench, and adopted by the common pleas for the sake of uniformity. In *Hollis* agt. *Brandon*, cited by Justice BRONSON, Ch. J. AYRE said: "but when the affidavit says, William Brandon, defendant, I should much doubt whether it would be bad merely because it was entitled 'Edward Hollis, plaintiff, and William Brandon, defendant,' before the commencement of the cause." On reference to *Tidd's Pr.* (1 vol. 183), we find the following statement in reference to the affidavit to hold to bail: "There being no action depending in court at the time when the affidavit is made, it ought not regularly to be entitled in the cause, and in one case the king's bench discharged the defendant out of custody on common bail, on account of its being so entitled. But in a subsequent case they thought, as the practice had obtained so long of adding

City Bank agt. Lumley.

a title to affidavits of this kind, it would be too much to determine that such practice had been erroneous, particularly as this had been a mere question of form, and did not interfere with the justice of the case. A rule of court, however, has since been made in the king's bench that "affidavits of any cause of action before process sued out to hold defendants to bail, be not entitled in any cause, nor read if filed." This is the practice referred to in the cases in this state upon the propriety of entitling affidavits, and we see that it was once held to be a mere question of form, not affecting the justice of the case. In *Pinder agt. Black* (4 How. Pr. Rep. 95), Justice HARRIS, although questioning the reason of the rule and its propriety, held that now the error if any, was one which did not affect the substantial rights of the adverse party, and should be disregarded under section 176 of the Code. In this case, nearly all the affidavits which we are considering, mention the defendant's name. He is styled the defendant, Morris Lumley, and it is not necessary to refer to the title to ascertain who the defendant is, as it was in *Milliken agt. Selye, supra*. And it may be further remarked that the practice has prevailed since the Code, of entitling these affidavits, and that it has obtained so long as to make it unreasonable in this case, at least after the action of the defendant in reference to the affidavits, to declare them to be erroneous. It may be further remarked, that the practice thus established was enforced in England and in this state, where the objection was taken in the first instance, and not where there was any attempt to answer the affidavits, as in this case. Here the defendant predicated his motion on the plaintiffs' affidavits, to which he presented his response, and if he did not adopt them, at least waived his right to object to them under the circumstances, relating as the information did to a question of practice. (*Noble agt. Prescott*, 4 E. D. Smith, 139; *Ubsdell agt. Root*, 3 Abb. Rev. 142; *Roadway agt. Graham*, 4 Abb. Rep. 468.)

City Bank agt. Lumley.

For these reasons, the first objection is declared untenable. As to the second objection, we say that the proofs submitted do not warrant the charge made. Mr. Gardnier states that the affiants were in each instance advised of the use to be made of their affidavits, and this answers the suggestion as to alteration. I say suggestion, because it is a grave charge to make upon slight evidence.

In reference to the third objection, it is perhaps only necessary to say that the view expressed at special term is correct. The third section of the act of 1863 (*Laws*, p. 449), confers generally the authority to administer oaths and affirmations to be read in evidence and used in any of the courts of this state, without prescribing any particular form of authentication. The jurat to the affidavits is in the usual form. It states that the deposition was subscribed and sworn to in the presence of the vice consul, and he so certifies under his seal of office. It is sufficient, and so far as the act of 1854 (*Laws*, p. 475) provides to the contrary, it must be regarded as abrogated. It could not have been the intention of the legislature to impose upon vice consuls duties in respect to the same subject not imposed upon others. If it had been the power conferred by section 3, *supra*, would not have been so general. We are referred to the case of *Blason agt. Bruno* (33 *Barb. S. C. R.* 520), as an authority for the proposition stated in the fourth objection. It is a special term case, in which it is held, not that our statute relative to arrests does not apply to frauds committed by foreigners without our jurisdiction, but that the removal or fraudulent disposition of property contemplated by that statute must be within the limits of this state.

Judge INGRAHAM states distinctly that a different rule exists where the defendant obtains the property fraudulently in a foreign land and brings it here. The case is not, therefore, an authority for the doctrine asserted by the defendant's counsel. We find, too, on examination of

City Bank agt. Lumley.

earlier cases, that the remedy is governed by the *lex fori* (*Smith agt. Spinola*, 2 *Johns. Rep.* 198; *Siccard agt. Whale*, 11 *Johns. Rep.* 194; *Pecks agt. Hoxier*, 14 *Johns. Rep.* 364); and notwithstanding that by the law of the country where the transactions arose, and of which the parties were residents, the defendant could not be arrested (*Smith agt. Spinola*, *supra*); see also *Gans agt. Frank* (36 *Barb. Rep.* 320), and *Peel agt. Elliott* (28 *Barb.* 200), in which the rule stated was acquiesced in as suggested by Judge CARDOZO (see also *De Weerth agt. Feldner*, 16 *Abb.* 295). The rule that in cases like this the *lex fori* governs, is too well established, and has too many reasons on which it rests to justify its disturbance by any other than the court of last resort. We are thus brought to the consideration of the reasons assigned for discharging the orders of arrest. As to the first: The case of *De Weerth agt. Feldner*, *supra*, is not analogous to this. The deponent in that case stated the sources of his information to be threefold, viz: A letter written by the plaintiff, another by the defendant, and a notarial act drawn up at Etherfeld, in Prussia, and certified by the Consular Agent of the United States at Bremen. He did not annex the letters and notarial act, or copies of them. He stated his own conclusions from their perusal and examination. For this reason the order was discharged. The rule is well settled that if the information is predicated of documentary evidence or other written papers, the documents or papers must be set out in some mode. But these cases do not depend wholly or chiefly upon any such evidence, and the rule to be applied is different. That rule is stated in the case referred to by Judge DALY, upon consideration of the authorities bearing upon the subject. It is that the information must be set out, that is, the facts and circumstances alleged against the defendant, the sources of that information, and a good reason why a positive statement cannot be procured. The object is not only to enable the judge to determine for

City Bank agt. Lumley.

himself whether the fraud has been committed, but to protect the defendant from a statement of information coined and not in fact derived from any person or source.

The affidavits upon which the orders of arrest were granted herein, were not entirely upon information and belief, either as to the indebtedness charged or the facts and circumstances grouped to sustain the allegation of fraud. But where information is set forth, the information itself, and the names and places of business of the persons by or from whom such information was given or obtained, are stated. And it appears also not only that such persons are residents of Canada or England, but the affidavits of some of them were produced and acted upon in granting the orders of arrest. We have, therefore, the necessary elements required in the affidavits which recite only information, viz.: the information, the source from whence it was derived, and the place of residence of the informants, at distances from this city, rendering it reasonable to dispense with the sworn statements of the informants to procure the arrest of a person who had hurriedly left his own domicile for foreign places, and whose fitting thence might take place before the affidavits could be procured—more particularly when, as in this case, there was enough disclosed to justify the belief *prima facie*, that the charge of fraud was truly made. For these reasons I think the affidavits were sufficient to put the defendant to his answer. I think it may be said in addition, that when affidavits in cases like these are based upon information, and it appears from all the evidence submitted that they contain truthful statements, although not in form *secundum artem*, they should not be rejected. They then become positive statements, as it were, and the court can see that the mischief which might otherwise ensue, cannot happen.

These views, embracing all the questions of law presented on the appeal, leaves but one branch of these cases undisposed of, and that is whether the proofs establish the

City Bank agt. Lumley.

fact that the defendant was guilty of a fraud, for which he could be arrested under section 179 of the Code. In stating my views on this subject, I shall not spread out all the details which have influenced my judgment, but state generally the prominent facts and circumstances which have controlled it. We find that in June, 1862, the defendant was in good credit and prosperous. His business was increasing, and so much so that he sent his son Edward to Europe to make purchases to meet the demands of his large and increasing Canada trade; and he requested Mr. Gunn to say, if Edward had occasion to refer to him while in England, that he had done a very large and profitable business, and paid all his accounts punctually, and his relations with the banks were such that he could get anything he wanted, and that he felt himself quite independent of everybody. His son went to England and made purchases to a large amount, and Mr. Gunn, honestly believing it to be so, stated to the English merchants who made inquiries of him, that the defendant was a man of large means and perfectly able to meet all engagements he would make. In October, 1862, he stated to Mr. Stephens, one of the plaintiffs, and from whom he was making purchases, that he had carried on a large and profitable business, and had made a great deal of money; that he was then possessed of abundant means, and would be perfectly able to pay for all his purchases punctually when the time of credit had expired; and further, that he was not making any other new accounts; not increasing the aggregate amount of his purchases, nor engaged in speculations, but buying for his regular Canada trade. And it may be here remarked that the defendant, to numerous creditors, made the statement that the purchases made by him were for his Canada trade. It also appears that the defendant's son and agent, Edward Lumley, represented to Mr. Woodhouse that his father was a merchant of long standing in Toronto, and had done a very large and prosperous business, and that if he should

City Bank agt. Lumley.

sell goods at fair prices the defendant would do a very large trade with him. It also appears that the goods purchased of the Messrs. Bottomley, were sold to the defendant on representations through his son and agent, Edward, that they were for the branch of the defendant's house at Montreal, and were to be manufactured there because it could be done cheaper there than at Toronto; and it is alleged that similar representations were made to several persons from whom goods were purchased. And it may be here remarked as corroborative of the fact that such representations were made, that they are in accordance with the object of Edward's visit to England, as declared to Mr. Gunn by the defendant himself. The purchases made and the money obtained by the defendant during the fall of 1862, amount at least to one hundred and fifty thousand dollars, as appears on the proofs submitted. Notwithstanding the defendant's asserted prosperous condition, his financial facilities, and his increasing Canadian trade in the summer and fall of 1862, he closed his place of business in January, 1863, in Montreal, having previously ceased to do business ostensibly in Toronto. Many of the goods that he had ordered for his Canadian trade, had in the meantime been shipped to New York, although it does not appear that he had any place of business there. The defendant's stopping business and payment at the time mentioned, namely, January, 1863, were circumstances which, notwithstanding his prosperous career, might have been explained or accounted for by some one of the many vicissitudes to which all commercial men are exposed, and that too notwithstanding he had declared he was opening no new accounts, and was not speculating. The occasion presented itself long before his arrest, but he declined to make any explanation, failed to meet his creditors in Canada, as he promised to do for that purpose; fled from thence, and when arrested here, and when asking to be discharged from arrest, continues to be as silent on the subject of his sud-

City Bank agt. Lumley.

den embarrassments and change of fortune as before. He does not deny the statements made by Mr. Gunn—he does not deny that he made the representations charged upon him personally as to solvency, prosperity and financial ability, or as to the object of his purchases herein set forth, but alleges that he contracted “no debt in Toronto or elsewhere, fraudulently, or with intent not to pay the same; and that he never diverted the place to which the shipment of the said goods was to be made, but the same was left to the discretion of his said agent, who exercised his own judgment in regard thereto.”

We may well pause here and ask what was the cause of his failure? What occurrences so destroyed his prosperity that with credit unimpaired and business large, increasing and profitable, he was unable to meet his engagements in so short a time, and compelled to fly from his home and business? The alleged sale of some goods in New York, and the alleged payment of their proceeds, is no answer to the questions. Unless the defendant was engaged in some unlawful enterprise, the revelation of which would subject him to other penalties, going from Scylla to Charybdis, it is fair and just to presume that some explanation would have come from his lips of these extraordinary transactions, and his extraordinary conduct. His reticence satisfies me that the credit which he enjoyed was used fraudulently to obtain a large amount of property, the fruits of which he might enjoy, to the detriment of his creditors.

I concur with Judge CARDOZO, in his conclusion expressed on the first motion, that the defendant was guilty of a huge fraud, and with Justice MONK, that the defendant was guilty of a fraud on a scale quite unusual, and I think that the order discharging the orders of arrest should be reversed, with \$10 costs.

DALY, F. J., concurred.

CARDOZO, J. I adhere to the views I expressed at special term, and I think the order should be affirmed.

Hubbard agt. Chapin.

COUNTY COURT.

HUBBARD agt. CHAPIN.

The return of a constable of personal service on a summons is conclusive of that fact, and cannot be impeached collaterally. (*Following the case of N. Y. & Erie R.R. Co. agt. Purdy*, 18 Barb. 574.)

*Schoharie County Court.**Argued October Term, 1864. Decided February Term, 1865.*

THE plaintiff sued the defendant before a justice of the peace of Schoharie county. The summons was returned by the constable personally served, and on the return day the plaintiff appeared and put in her complaint. The defendant then before answering the complaint, moved that the suit be dismissed and defendant be discharged, on the ground that the summons had not been served upon the defendant. The defendant also at the same time offered to prove that the summons had not been served upon the defendant, and to disprove the constable's return of personal service. The justice overruled the motion and offer, whereupon the defendant put in his answer therein, setting up among other defences, that the summons had never been served on the defendant, and again upon the trial the defendant renewed his motion and offer made on the return day for a dismissal, on the ground that the summons had not been served on the defendant. The justice again overruled the motion and offer, and after hearing the evidence and receiving the verdict of the jury, rendered judgment against the defendant for \$10 damages, and costs, \$3.52. The defendant appeals to this court.

PETER S. DANFORTH, *for plaintiff*,

cited *Putman agt. Man* (3 Wend. 202); *Allen agt. Martin* (10 Wend. 300), claiming that the constable's return of per-

O'Reilly agt. King.

sonal service was conclusive, and defendant could not impeach it.

NORMAN W. FALK, *for defendant*,

cited *Van Rensselaer agt. Chadwick* (7 *How. Pr. Rep.* 297); *Fitch agt. Devlin* (15 *Barb. S. C. R.* 47), claiming that the latter case overruled *Putman agt. Man*, and *Allen agt. Martin*. *Fitch agt. Devlin* expressly holds that the return of the constable of personal service of a summons is not conclusive, and may be disproved and contradicted. The return is only *prima facie*, not conclusive (7 *How. supra*).

LAMONT, County Judge. The only question in this case is, had the defendant the right to impeach the constable's return, and show in opposition thereto that the summons issued by the justice had not been served. It seems to me that the case of the *New York & Erie RR. Co. agt. Purdy and Adams* (18 *Barb. S. C. R.* 574), is decisive upon this point. Justice JOHNSON who wrote the opinion in 18 *Barb.*, 574, in reviewing *Fitch agt. Devlin* (15 *Barb.* 47), thinks the opinion in that case not well considered. The case in 18 *Barb. S. C. R.*, 574, above referred to, covers the whole ground, and is in harmony with the older cases. I have arrived at this conclusion after considerable doubt and hesitation.

The judgment should be affirmed.

NEW YORK SUPERIOR COURT.

PATRICK O'REILLY agt. EDWARD KING.

The court in the exercise of its equity powers will not compel an unwilling purchaser to take a doubtful title.

But at law, where a party seeks to disaffirm and rescind a contract of sale, and to recover back the deposit of his purchase money on the ground of a defective

O'Reilly agt. King.

title, he must satisfy the court that the title is *absolutely bad*, before he can recover. A merely doubtful title will not do.

The supreme court acquires jurisdiction of proceedings for the sale of the real estate of *infants*, on their application by their next friend *orally*. The form of the application is of no consequence if the substance is given. The material question is, did the infants apply by their next friend.

The fact that a *next friend* is a *creditor* of the infants, does not disqualify him from acting in that capacity, on an application for a sale of their real estate.

And where the *next friend* is described as being the *uncle* of the infants, and only male relative of full age, he is by such relation a suitable person to apply for a sale of the infants' real estate.

An objection that the *special guardian* of the infants entered into a contract of sale conjointly with the adult owners, and that the deed tendered to the plaintiff, was in like manner executed by the guardian jointly with the other owners, was without foundation. That other parties owning other interests joined in the same *contract and deed*, could not deprive either instrument of its binding effect upon all concerned.

General Term, February, 1865.

Before ROBERTSON, Ch. J., MONELL and GARVIN, Justices.

THIS was an action to recover a deposit of \$600 made upon a contract for the purchase of two lots of land. The contract provided that if the title on examination should prove insufficient, the deposit should be paid back. The objection to the title was that certain proceedings in the supreme court for the sale of the interests of infant owners were defective.

J. E. PARSONS, *for appellant, defendant.*

J. E. BURRILL, *for respondent, plaintiff.*

By the court, MONELL, J. I am unable to subscribe to the views of the learned chief justice, that the title offered to the plaintiff was insufficient, and so doubtful that he had a right for that reason to disaffirm the sale and recover his deposit. If the action had been on the equity side of the court to compel Reilly to take the title, I should express my opinion of its sufficiency with much hesitation. The difficulties suggested by the chief justice would of themselves, cause me to hesitate and perhaps to doubt. But the action is at law to recover back the deposit upon a rescission of the contract of sale. And I think the error of

O'Reilly agt. King.

the learned judge was in applying the rule in equity instead of the rule at law to a question involving the sufficiency or goodness of a title to real property. The court, in the exercise of its equity powers, will not compel an unwilling purchaser to take a doubtful title.

Much discussion has been had as to what is a doubtful title. If the court is fully informed of the facts, it must know whether a title is good or bad. If the facts are not fully disclosed, it may with propriety doubt. It is, however, with practical certainty and practical doubts that the court must deal. In the language of Lord HARDWICKE (*Lyddal agt. Weston*, 2 *Atk.* 20), "the court must govern itself by a moral certainty, for it is impossible in the nature of things, that there should be a mathematical certainty of a good title." Where the doubt of the sufficiency of the title is reasonable and practical, the court in its discretion will excuse performance by the purchaser. The rule, however, at law, is quite different. There the party disaffirming the contract must satisfy the court that the title is absolutely bad, and the court must decide that it is absolutely bad, before the party can recover. A merely doubtful title will not do (*Romilly agt. James*, 6 *Taunton*, 263).

The question then arises, whether upon the facts in this case the title offered by the defendant is bad. That is the question to be decided in this case. I pass over all of the objections to the title except three, being satisfied, for the reasons so well expressed by the chief justice, that they are really groundless. The first objection I shall notice is, that it is doubtful whether the supreme court acquired jurisdiction of the proceeding to effect a sale of the infants' interests. The power of the court to authorize the sale of the real property of infants is derived from the statute, and is not inherent in the court. Hence the statute must be strictly followed, and its terms fully complied with. The language of the statute (2 *R. S.* 194, § 170,) is: "Any infant seized of any real estate * * * may by his next

O'Reilly agt. King.

friend * * * apply to the court * * * for the sale," &c.

The petition before us was by Isabella R. Cochran, &c., infants over the age of fourteen years, and Caroline Ella Cochran, &c., infants under the age of fourteen years, "by Bayard Clark, * * * their uncle and next friend, and only male relative of full age." The petition is signed by Bayard Clark, without any addition to his name of next friend, as respects the infants over the age of fourteen years, and by all the infants in person. There is nothing in the statute prescribing the manner in which an infant may apply to the court. And I see no reason why he may not by his next friend apply orally. The courts have established rules on this subject, but they are mere rules, which the court may in its discretion, at any time disregard (*Dorcas agt. Bungham*, 6 *Car. & Payne*, 248). The late court of chancery at an early day, adopted a rule on this subject, which subsequently became and continued the 158th standing rule of that court, and which required the application to be made by petition, prescribing its contents. But there is no doubt that the court may, in a given case, depart from the rule, and allow the application to be made in some other way, and I can see no reason why it may not be made orally, although it probably would not be wise to allow such a practice. The material question is, did the infants apply by their next friend? The form of the application is of no consequence, if the substance was there. The description in the petition is clear: "The petition of, &c., by their next friend." No one can doubt, I think, that this was the application of the infants by their next friend, as required by the statute. And the supreme court having determined that it was sufficient in substance, the mere departure from some prescribed form or rule of court would not affect the jurisdiction of the court over the application. The case of *Hyatt agt. Seeley* (11 *N. Y. R.* 52), is not opposed to this view. In that case the order authorizing

O'Reilly agt. King.

the sale directed the deed to be executed by the guardian "in the name of the infants." It was executed by the guardian with the designation of guardian, &c., without naming the infants in the body of the deed or elsewhere. But the court intimate that if the deed had purported in its commencement to be made by the infants, it would have been sufficient. Besides, that was an application to the equity side of the court to compel the purchaser to take the title.

Second. It is objected that the application by Bayard Clark, as the next friend of the infants, was improper. The objection, however, was chiefly that he was a creditor of the infants. That was not an adverse interest, and nothing short of an interest in opposition to the interests of the infants in the property sought to be sold, would disqualify even a special guardian. The statute does not tell us who is the next friend, nor how he is to be selected or appointed. The 158th rule of the late court of chancery said some relative or friend might make the application, and in one case (*Matter of Whitlock*, 32 Barb. 48,) the mother was deemed a suitable and proper person. In this case the next friend is described as being their uncle and only male relative of full age. I cannot doubt that so near a blood relation is the next friend within the meaning of the statute. Infants being *non sui juris*, cannot act for themselves, and the policy which requires the interposition in their behalf of a next friend, is fully met by the presumption that the person selected will from motives of love and affection, be desirous to promote and preserve their interest, and the next friend may therefore well be considered the near friend. I can but believe that any one may be the next friend, but it is the duty of the court as the universal guardian of the persons and estates of infants, to scrutinize closely the qualifications and disinterestedness of those who present themselves as such.

The supreme court having entertained the application,

O'Reilly agt. King.

we must presume that they were satisfied that the next friend was a suitable person to apply for the infants. And as the statute does not disqualify him, I cannot see how any question can seriously be raised against the validity and regularity of the proceedings in that respect.

Third. The objection that the special guardian of the infants entered into a contract of sale conjointly with the adult owners, and that the deed tendered to the plaintiff was in like manner executed by the guardian jointly with the other owners seems to me to have no foundation. The guardian could neither agree to sell, nor could he convey any other than the infants' interests. The order authorized that and no more, and to that extent and no further, did the guardian agree to sell, or did he convey. That other parties owning other interests, joined in the same contract and deed, could not deprive either instrument of its binding effect upon all concerned.

In looking throughout these proceedings, I have not been able to detect any departure from the statute. There has been, it seems to me, not only a substantial but a literal compliance with its terms. If there was any departure, it was from some rule or prescribed form of court, unessential (except as preserving uniformity in practice), and subject to change at any time, but in no way impairing the validity of the proceeding. The contract provided that if the title should be found to be "insufficient," the deposit should be returned. No greater signification can be given to the word "insufficient," than its natural meaning, namely, that the title should be adequate, and such as should suffice and be equal to the end of vesting a good title in the purchaser. The parties doubtless meant that if the title was defective, and the purchaser would not get a good title, the contract should be at an end. But they did not mean, nor are the words used capable of the meaning, that the title should be absolutely and mathematically proven to be good. In any aspect I can view the case, I cannot conclude that the

O'Reilly agt. King.

title is bad, or even that there is, as was said by Baron ALDERSON (*Cattell agt. Corral*, 4 Y. & C. Ex. 237), "a reasonable, decent probability of litigation" about it.

I am, therefore, of opinion that the conclusion of the chief justice was erroneous, and that the judgment should be reversed and a new trial granted, with costs to abide the event.

ROBERTSON, Ch. J., *dissenting*. I have not been able to satisfy myself from anything advanced before us, of the absence of all obligation on the part of the defendant to restore to the plaintiff his deposit. There seems to be no doubt of the title to the land in question of the parties on behalf of whom, as vendors, the contract in question was made. Without reference to the minority of some of such vendors, the pendency of proceedings to authorize some disposition of their interest, and the authority given to a special guardian, to sell or mortgage as he should think fit, and laying out of view the fact that it was made by an agent, it appears on its face to be a mere contract by owners of land to sell and convey it, giving a good title therefor by a certain day. By introducing such extraneous facts, not noticed in the contract, it is sought to be converted into a mere contract by the defendant or his principals, to procure a conveyance of a good title by a certain day, which, of course, would be entirely speculative. To accomplish this, the condition of the return of the deposit in case of the insufficiency of the title on examination is brought down to a mere absolute failure of title. The procuring of an order from a court authorizing the execution of a conveyance two days before the time for delivering it expired, and a tender of such conveyance one day before that time, is claimed to be a compliance with such contract, although no time was thereby afforded for any examination of the title at all. Both parties on the contrary, treated the examination spoken of as one to be commenced forthwith, when of course the infancy of some of

O'Reilly agt. King.

the vendors, the inchoate condition of the authority to the special guardian, and the alternative character of the disposition thereby authorized as being to sell or mortgage, might be discovered. Nothing short of prophetic power in such case would have enabled the plaintiff to discover on his examination of the title, whether the supreme court would or not authorize a sale, and confirm the contract in question. The fact that they did so, has no bearing on the question whether the title thereby to be acquired was that to investigate which the plaintiff was entitled, as well as to a reasonable time for the purpose of discovering its sufficiency. I apprehend that the only legitimate construction of such contract according to its terms, is that the vendors therein named undertook that they had a good title, which they would be ready to convey on or before the succeeding first of November, into an examination of the sufficiency of which the plaintiff could forthwith enter. And the legal result of it was, not that the plaintiff was bound to wait until the succeeding first of November to ascertain whether a title could then be acquired, which he was bound to take without examination, provided it should eventually prove good, but that if on an immediate examination he could find no one authorized to give him a title, he could rescind the contract and recover back his deposit. Under the contract there was no one from whom the plaintiff could at any time demand a conveyance, and the defendant could retain his deposit until at least the first of November, and then pay it back to him, and thus rescind the contract.

I cannot but regard the word "insufficient," as applied to the title in this contract, as meaning something more than defective. The warranty of a good title, implied in every sale of lands (*Burrell agt. Jackson*, 9 N. Y. R. 535), was already inserted in express terms. And it was stipulated that "if the title should on examination be found insufficient," the deposit, with interest, was to be returned. Some act of examination was necessary, which was to be

O'Reilly agt. King.

done by the plaintiff, and the word "insufficient," as expressive of its result, did not describe an absolute but a relative defect, having regard to some purpose or consequence. Taken in connection with the examination to be made, it probably was used in a sense similar to unsatisfactory to the plaintiff as a purchaser, that is, one to which a reasonable objection could be made, with which the party ought not to be satisfied (*Faven* agt. *Davison*, 2 *Duer's Rep.* 158), and not as an absolutely bad title, or none at all. I think, however, that the making of the contract for vendors incompetent to convey any title, the title proposed to be given by a guardian appointed in a judicial proceeding, whose authority to sell rested entirely on the future discretionary action of the supreme court in which such proceeding was pending, and against whose neglect or omission the plaintiff had no redress, and the character of the contract being a sale not yet sanctioned by the court in question, and, therefore, not binding on the supposed vendors, formed reasonable grounds of objection to the title, within the meaning of such contract. Such objection was substantially stated by the plaintiff on the tender of the deed. Upon either ground, therefore, that the contract was made on behalf of persons incompetent to convey, and was not a mere covenant to procure a title in future, or that no authority to convey was vested in any one, thus rendering the power of giving the title agreed to be given impossible, and of course any title that could be given to the plaintiff insufficient, I think he had a right to rescind it. If the examination of the title was to be made after the acquisition of authority to convey, I think the objections specified in my opinion at special term were good grounds for rescinding the contract, as rendering the title insufficient within its meaning.

I think the judgment should be affirmed.

Slosson agt. Lynch.

SUPREME COURT.

JOHN SLOSSON agt. LOUISA LYNCH, Administratrix, &c.

The words "next of kin," used *simpliciter* in a deed or will, mean next of kin according to the statute of distributions, including those claiming *per stirpes* or by representation.

The English cases of Elmsley agt. Young, 2 Mylne & Keen, 780; and Witty agt. Mangler, 4 Beaven, 358, affirmed by the House of Lords, 10 Clark & Finnelly, 215, holding that the words, "next of kin," used simpliciter, are to be taken to mean "nearest of kin," disapproved.)

New York General Term, November, 1864.

Before LEONARD, P. J., BARNARD and SUTHERLAND, Justices.

APPEAL from judgment at special term.

WM. M. EVARTS, *for the defendants and appellants, Jonathan Ogden, John A. Kernochan and Charlotte W., his wife, and Henry P. Kernochan and Grace W., his wife.*

DANIEL LORD, *for the defendants, Goelet and Joseph Ogden.*

By the court, SUTHERLAND, J. The subject of the deed of settlement was wholly personal property. By the deed of settlement, Mrs. Lawrence was to have the income for life, with a certain power of appointment by will or otherwise, in the event of her death before that of her husband, and in the absence of any appointment, then the property was to go to her issue then living, and the children of such as might be deceased, *per stirpes* and not *per capita*, and in default of such issue "to the next of kin of the party of the first part," Charlotte E. Ogden, afterwards Mrs. Lawrence. Mrs. Lawrence died before her husband, without issue, and without having made any appointment.

At the time of the execution of the settlement, Mrs. Lawrence had neither father, mother, nephews or nieces, but she had two sisters, Sarah Goelet and Grace W. Ogden, and one brother, Jonathan Ogden. The two sisters sur-

Slosson agt. Lynch.

vived Mrs. Lawrence, but the brother died before she did, leaving three children, the defendants, Jonathan Ogden, Charlotte W. Kernochan and Grace W. Kernochan.

The question was whether these children of the deceased brother were entitled to share in the distribution of the fund. The court below held as a conclusion of law, that the two sisters of Mrs. Lawrence were alone entitled to the fund, and that the children of the deceased brother took nothing. From this judgment the defendants Jonathan Ogden, Charlotte W. Kernochan and Grace W. Kernochan (their husbands joining), have appealed. It is evident that the sole question is as to the meaning of the words next of kin, in that clause of the settlement limiting the property to the next of kin, in default of appointment and of issue. Had we not been referred to certain comparatively recent English cases (*Elmsley agt. Young*, 2 *Mylne & K.* 780; and *Witty agt. Mangler*, 4 *Beavan*, 358), affirmed by the House of Lords (10 *Clark & Finnelly*, 215), holding that the words "next of kin," used *simpliciter*, are to be taken to mean "nearest of kin," I should probably have stated the question in the principal case to be whether the words "next of kin," were used in the settlement in their technical statutory sense, or meant nearest of kin; and then, assuming that the words "next of kin," used *simpliciter*, had a well known technical statutory meaning, I should have contented myself with saying that there being nothing on the face of the instrument, or in the context, to show that the words were used in a sense other than the technical statutory sense, it was to be presumed the parties used them in that sense.

Though the English decisions referred to are not obligatory upon us, yet respect for so high authority prevents me from assuming that the words "next of kin," used *simpliciter*, in a limitation or disposition of personal property by voice or deed, have any technical statutory meaning, and I will therefore state the question in the principal case

Slosson agt. Lynch.

to be whether the words "next of kin," in the limitation by the deed of settlement in default of issue, and of the exercise of the power of appointment, mean nearest of kin? By stating this to be the question, I do not assume that the words "next of kin," used *simpliciter*, have a technical meaning, but I undertake to show that they have a technical statutory meaning, and that this meaning is not the nearest of kin, but those of the kindred or relations by blood, who in cases of intestacy, by the statute of distributions, succeed to or share in the intestate's personal property; and that the words "next of kin," and the word "distributees," under the statute, are not synonymous, but that the words "next of kin," mean such of the distributees as are of the kindred or relations by blood. It may be well to refer to a few of the established rules in construing wills and other instruments disposing of or limiting property, before examining the question in the case.

1. They are to be construed so as to carry into effect the intent of the parties, to be gathered from the whole instrument, so far as such intent can by law be carried into effect.

2. Words are to be taken in their ordinary popular meaning, and the intention is not to be defeated by the use or misuse of technical terms.

3. Nevertheless if technical terms are used, it will be presumed that they are used in their technical legal sense, unless the context shows that they were intended to be used in a different sense. (*De Kay* agt. *Irving*, 5 *Denio*, 646; *Lane* agt. *Lord Stanhope*, 6 *T. R.* 352; *Hodgson* agt. *Ambrose*, *Douglas*, 337.)

In the principal case there is certainly nothing in the context to show that the words "next of kin," in the limitation to the "next of kin," were not used in their strict technical legal sense, if they had any. On the contrary, I think the use of the words "or other next of kin," in mentioning the objects of the power of appointment, and the use

Slosson agt. Lynch.

of the technical term *per stirpes*, and not *per capita*, in the limitation to the issue of Mrs. Lawrence, and the children of such as may be deceased previously, in the same sentence, tend to indicate that the words "next of kin," in the limitation to the next of kin were used in a technical sense, if they had any. The question then is, whether the words "next of kin," simply had or have the technical meaning above stated. I think it may be said that they have had this technical meaning since the statute of distributions (22 and 23 Car. II, c. 10), and that this statute originated and gave this technical meaning to them. The word next, as used in the sixth section of the statute, was not used to express near or nearest alliance by blood to the intestate, but next in place or order, to or after children and their representatives, previously mentioned in the section. The truth is that the word next, as an adjective, is rarely if ever used even in conversation, to express nearness or degree of nearness by blood or affection, between another person and the speaker, except as next after, next in order or degree to some other person previously mentioned. Certainly if one should hear a person call another his next friend, he would not by these words unexplained, understand his near or nearest, dear or dearest friend by affection, without reference to any other person, but he would probably understand his next door neighbor, or a friend next in place, time or degree, to or after some other friend, or technically his "next friend" in some legal proceeding. I suppose it will not be denied that the words "next friend," have acquired a technical meaning, which originated in a very old statute.

The word next was not used in the statute of distributions to express the relationship or the degree of relationship by blood to the intestate, but as between the children and their representatives, and other kindred of the intestate, the order in which the kindred should succeed to or share in the personal estate. The children and their representatives are not expressly called kindred in the statute, but

Slosson agt. Lynch.

they are impliedly called so, and so are the legal representatives of the "next of kindred," within a certain limitation. Now considering that previous to this statute there appears to have been no way of enforcing the distribution of estates of intestates; that the administrator could keep the whole surplus (*Edwards agt. Freeman*, 2 P. Wms. 447, 448; 2 *Black. Comm.* 515); that the statute may therefore be said to have first given the right of distribution; that the statute regulates the distribution as between the widow by the term wife, and the kindred, and then the order in which kindred shall take or share; first, children and their representatives, and then the next kindred in equal degree, and their representatives, within a certain limitation, and that the statute probably originated the principle of representation in the succession to personal estates of intestates, is it not plain as the word heir or heirs acquired its technical legal meaning, from the act or fact of the succession to estates of inheritance (*ex hereditate*) by descent, that is by law, so the words "next of kindred," or "next of kin," taken from the statute of distributions, would be likely after the statute to acquire a technical legal meaning from the act or fact of succession under or by the statute, and that this meaning would be likely to be not synonymous with distributees under the statute, but the kindred or blood relations (including those claiming by representation, but excluding a widow as such), who in fact had the right of succession, or the right to share in the distribution by the statute.

The whole history of the administration of this statute of distributions, and of the statute 1 *Jac. II*, c. 17, altering it in certain respects, and of our statutes of distribution (1 *R. L.* 313, §16; 2 *Rev. Stat.* 96, §75), shows that the words "next of kin," have acquired this technical meaning. The cases holding that the widow as such, is not included in these words used *simpliciter*, nor the husband, where the wife has a power of appointment to her next of kin, simply show that the words "next of kin," have acquired this

Slosson agt. Lynch.

technical meaning. (*Green agt. Howard*, 1 Bro. Ch. R. 29; *Watt agt. Watt*, 3 Ves. 244; *Garrick agt. Lord Camden* 14 Ves. 381, 382; *Baily agt. Wright*, 18 Ves. 49; *Wilson agt. Frazier*, 2 Hump. 30; *Wright agt. Meth. Epis. Ch. Hoffman*, 212, 213.)

No doubt these words have been used frequently as meaning distributees generally, including the widow, when there was no occasion to discriminate as to the description or character by which the distributee or distributees claimed, but when thus used, they were used in a secondary, statutory and technical sense. I doubt whether it can be said that these words have ever acquired an ordinary, popular meaning, synonymous with nearest relations or nearest of kin. As was pertinently said on the argument, no one speaks of his or another's dearest next of kin. Any one would be surprised to hear a sane person say such a one has a next of kin born, or another next of kin born, or has a certain number of next of kin. There has been no occasion (the wants of the language have not required) that the statutory word next should supplant or be used instead of the word near or nearest, to express close or closest alliance by blood or affection to the speaker. The philosophy of language shows that one word is much more likely in course of time to acquire a secondary and a variety of secondary (if the expression is permissible) meanings than three words, used in connection in a particular manner and for a particular purpose in a statute, neither of which could be dropped without destroying their statutory meaning.

It is easy to see how the word heir or heirs, came to have a secondary, and perhaps more than one secondary meaning. First, you have heir or heirs, meaning he or they, who succeed to estates of inheritance by descent by law; then you have heir or heirs, apparent or presumptive, and then you have heir or heirs, with the word apparent or presumptive dropped, meaning a living child or children. No one would be surprised at the remark that A. B., his neighbor, has an

Slomon agt. Lynch.

heir, or another heir, or a certain number of heirs. I think it may be said that all of the English cases prior to *Elmsley* agt. *Young* (2 *Myl. & Keen.*), before mentioned (in 1835), tended to show that the words "next of kin," used *simpliter*, in a will or deed, disposing of, settling or limiting personal property, had this meaning. I am certainly safe in saying that this was the first decision to the contrary. In *Roach* agt. *Hammond* (*Prec. in Ch.* 401), the devise was to H. of all the testator's personal estate, for the use of his relations, without specifying any in particular, or using any other word; and it was decreed that those relations (as I understand the report of the case) who by the statute of distributions would be entitled to personal estate in case the testator had died intestate, should take the property in the same proportions.

In *Thomas* agt. *Hole* (*Cases in Eq. in temp. Talbot*, 251), there was a bequest of £500 to the relations of Elizabeth Hole, to be divided equally between them. At the testator's death, Elizabeth Hole had two brothers living, and several nephews and nieces. It was determined first, that the word relations should be confined to such relations as were within the statute of distributions; and next, as the testator had directed the £500 to be divided equally among them, that the brothers, nephews and nieces take *per capita*. This decision appears to have governed the decisions in *Edge* agt. *Salisbury* (*Ambl.* 70), and *Isaacs* agt. *Defriez* (*Ibid.* 595), where the words were "poorest relations;" *Widmore* agt. *Woodroffe* (*Ibid.* 636), where the words were "the most necessitous of my relations;" *Harding* agt. *Glynn* (1 *Atk.* 469); *Winthorne* agt. *Harris* (2 *Ves.* 527), where the words were "near relations;" *Green* agt. *Howard* (1 *Bro. Ch. R.* 28, *Perk. ed.*), where the words were, "to my own relations who shall then be alive, share and share alike;" *Phillips* agt. *Garth* (3 *Bro. Ch. R.* 64), where the words were, "to be divided among next of kin, share and share alike;" *Raynor* agt. *Mowbray* (*Ibid.* 234), where

Slonson agt. Lynch.

the words were, "to and among all and every such person and persons who shall appear to be related to me only, share and share alike; *Loundes agt. Stone* (4 *Ves.* 649), where the gift was of a residue to the testator's "next of kin or heir at law, whom I appoint my executor" (the testator in this case leaving one brother, and by deceased brothers a niece and several nephews, one of whom was his heir at law, and distribution according to the statute being decreed); *Vaux agt. Henderson*, reported in note to *Horseman agt. Henderson* (1 *Jac. & Wal.* 387), where there was a legacy to A., "and failing him by decease before the testator, to his heirs," and A. dying before the testator, the legacy was decreed to belong to the next of kin of A. living at the time of the testator's death; *Stamp agt. Cooke* (1 *Cox*, 230), where the words were, "next relations," coupled with words tending to show that the testator meant by "next relations," sisters, nephews and nieces, and where Lord KENYON expressly said, if a testator makes a bequest to his "next of kin," and stops there, the statute was the rule to go by; *Hinckley agt. McLaurens* (1 *Myl. & Keen*, 27), where the words were "next of kin," used *simpliciter*, in a gift over, and where it was held that these words, without any explanatory context showing a different intent, must be taken to mean next of kin according to the statute of distributions. Of these cases, the last and *Phillips agt. Garth* (3 *Bro. Ch. R.*), are directly in point, for in these cases the words "next of kin," were used *simpliciter*, and without any words qualifying them, as descriptive of the object or objects of the gift. It will be recollected that in *Phillips agt. Garth*, the words were, "to be divided among next of kin, share and share alike." Justice BULLER held that the gift should be divided *per capita*, and not *per stirpes*, among surviving brothers, and nephews and nieces, representing deceased brothers and sisters, because the gift was to "next of kin, share and share alike," but I do not see that this holding impeaches the

Slosson agt. Lynch.

decision as to the technical meaning of the words "next of kin." The words "share and share alike," did not qualify the words "next of kin," as descriptive of the objects of the gift. It is probable, however, that the holding that the brothers, nephews and nieces should take *per capita*, led to the doubting remarks (*Brandon agt. Brandon*, 3 *Swanst.* 319; *Garrick agt. Lord Camden*, 14 *Ves.* 385; and *Smith agt. Campbell*, 19 *Ves.* 404) about the decision in *Phillips agt. Garth*, but those cases did not call for such doubts. In *Brandon agt. Brandon*, the words of the marriage settlement were, "to the nearest and next of kin" of the wife. In *Garrick agt. Lord Camden*, the words of the residuary clause of the will were, "to be divided amongst my next of kin, as if I had died intestate." In *Smith agt. Campbell*, the words of the bequest were, "to my nearest surviving relations in my native country, Ireland." In none of these cases were the words "next of kin," used without qualifying words. In *Brandon agt. Brandon*, the word nearest may be said to have qualified the words "next of kin;" in *Smith agt. Campbell*, the words "surviving relations," were qualified by the word nearest, and the subsequent words. The very question in the principal case is whether the words "next of kin," used *simpliciter*, mean nearest of kin, and that was the question in *Elmsley agt. Young* (2 *Myl. & K.* 780), reversing the decision of the master of the rolls in the same case (*Ibid*, 82), and overruling *Phillips agt. Garth*, and *Hinckley agt. McLaurens*. In *Garrick agt. Lord Camden*, the additional words, "as if I had died intestate," left no room for doubt. If in the principal case, the words "as if she had died intestate," had been added to the words "the next of kin of the said party of the first part," we never should have had this case before us. In 1 *Maddock*, 31, *Anonymous*, and in *Wimbles agt. Pitcher* (12 *Ves.* 433), where the words were, "next of kin in equal degree," the decisions went upon the additional words in equal degree. In

Slosson agt. Lynch.

Colton agt. Scarancke (1 *Maddock*, 35), where the words in a limitation by settlement were, "to the next of kin of the said Anne Parr, her own blood and family, as if she had died sole and unmarried," it was held that the next of kin took as under the statute of distributions.

I will refer to a few cases prior to *Elmsley agt. Young*, where other general words were used as descriptive of the object or objects of the limitation, devise or bequest. In *Robinson agt. Smith* (6 *Simons*, 47), the testator bequeathed £700 to his daughter's husband, his executors, &c., in trust, to pay the interest to his daughter, for her separate use for life; after her death to such persons as she should appoint by will, and in default of appointment to "her personal representatives;" and it was held that her next of kin, to the exclusion of her husband, were entitled to the £700 (see also *Baines agt. Otley*, 1 *Simons*, 465). In *Crosby agt. Clare* (*Ambl.* 397), and *Parsons agt. Baker* (18 *Ves.* 476), the general word was descendants, but that was qualified by other words, so as to show that a class of descendants was meant. In neither of these cases was there any question of claiming by representation. In *Butler agt. Stratton* (3 *Bro. Ch. R.* 367), the legacy was to the descendants of A. and B. equally, and it was held that the children and grandchildren took *per capita*. In *Wright agt. Alkyns* (1 *Tur. & Russ.* 143), it was held that under an immediate devise to A. for life, remainder to "my family," the heir at law of the testator is entitled in remainder (see the opinion of the Lord Chancellor in this case, 158 to 164).

I think it may be said that not one of the cases prior to the decision in *Elmsley agt. Young* (2 *Myl. & K.* 780), interferes with the decisions in *Phillips agt. Garth* and *Hinckley agt. McLaurens*, but that most of them tend forcibly to support these decisions; but it is not to be denied that as the views of the LORDS COMMISSIONERS in *Elmsley agt. Young*, were affirmed by the HOUSE OF LORDS in *Witty agt. Mangler* (10 *Clark & Finnelly*, 215), it may be said to be now estab

Slosson agt. Lynch.

lished in England that the words "next of kin," when used *simpliciter*, as descriptive of the object of a bequest or of a limitation of personal property in a marriage settlement, without any reference to the statute of distributions, or any words in the context to show a different meaning, must be taken to mean "nearest of kin," but Lord CAMPBELL said in substance, that he concurred in this decision with great reluctance; that they were driven to put a construction upon the terms "which could not by possibility have entered into the contemplation of the parties, or the gentleman who framed" the settlement; that the law had "by some bad luck got into a strange state," and that upon the whole, it seemed to him that greater mischief would ensue "from shaking or overturning that case of *Elmsley agt. Young*, than by adhering to it." He further said: "If I had to decide *Elmsley agt. Young*, I should certainly have hesitated a good deal before I came to the decision that was pronounced by those very learned judges, the then LORDS COMMISSIONERS."

I think the decision in *Elmsley agt. Young*, by the LORDS COMMISSIONERS, shows that the greatest judicial mind is liable to fall into a rut, and when it does, common sense teaches that its very load of learning tends to keep it in. In my opinion there is nothing in the opinions of the LORDS COMMISSIONERS in *Elmsley agt. Young*, or in the opinion of Lords COTTENHAM and CAMPBELL, in *Witty agt. Mangler*, which shows that the decisions in these cases should be adopted or followed here. I am not aware of any case in this state deciding the question in the principal case. The last sentence in the second paragraph of the head note in *Wright et al. agt. Trustees of Methodist Episcopal Church (Hoffman's Ch. R. 202)*, is wholly unauthorized. It was not decided in the case, and there was no occasion to decide that the phrase "next of kin," when used *simpliciter*, does not mean those entitled under the statute of distributions, but the next in blood. It was held in that case

Slosson agt. Lynch.

that the legacy to Euphemia Murray did not lapse, but that her next of kin took. She left children, but no grandchildren. There was no claim by representation or *per stirpes*. Vice-Chancellor HOFFMAN refers to the decision of the LORDS COMMISSIONERS in *Elmsley* agt. *Young*, but he says that the decision did not interfere with his decision, and it clearly did not.

In *Drake* agt. *Pell* (3 *Edward's Ch.* 251), the words "heirs, devisees, or legal representatives of the child so dying," were held to mean "next of kin" of the child so dying, the subject of the gift being money. There was no claim *per stirpes* or by representation, in this case. In *Dominick* agt. *Sayre* (3 *Sandf. Sup. Ct. Rep.*), there was a devise by Dominick of eight lots of land to the testator's daughter Margaret, for life, with power to give the same by deed or will to any of the main descendants of the testator's family of the name of Dominick. The daughter by her will devised the lots to male descendants of the testator by the name of Dominick, and among them she gave to her nephew John Jacob, son of her deceased brother Jacob F., two of the lots. The nephew died before his aunt, whereby the devise to him lapsed, and thereby the legal estate to the two lots became vested in the residuary devisees of the original testator and their heirs, subject to the execution by the court of chancery of the power so given to the daughter. The only male descendants of the family of the testator of the name of Dominick, were, as I understand the facts, grandsons of the testator, and sons of two of the grandsons, and it was held that all the male descendants were entitled to take *per capita*, and not *per stirpes*. This decision was probably right, for it might be said that the power of appointment given to the daughter was limited to a class of the testator's descendants, that is, his male descendants of his family by the name of Dominick; but I have no hesitation in saying that in my opinion, a devise to A. B. for life, remainder to his descendants or to "my

Slosson agt. Lynch.

descendants," *simpliciter*, should and would be held to be a devise to A. B. for life, remainder to the heirs at law of A. B., or of the testator. In either case I think the word descendants would be held to mean "heirs at law;" whether the heirs at law would be deemed to take by descent or under the devise, is another question. Since the statute (3 and 4 William IV, c. 106), no doubt in England the heir would be deemed to take in the character of devisee (see 4 Kent's Com. 5th ed. 412, note c).

In *Phyfe* agt. *Phyfe* (3 Bradford, 45), there was a bequest to sons "and their legal representatives," adding "the legal representatives or children of my said sons to receive such part only," &c., and it was held that the words "legal representatives," meant the children, and not the "next of kin" of the sons, and that substitution was not intended beyond the children of the sons. This decision evidently went on the additional words "or children," &c (see also *Barstow* agt. *Goodwin*, 2 Bradford, 413). In *McCulloch* agt. *Lee* (7 Ohio, 15), the question was between the mother and aunt of a child, under a statute regulating the descent of lands. The words of the statute were: "If there be no brothers or sisters, or their legal representatives, the estate shall pass to the next of kin, and of the blood of the intestate," and it was held that the mother took. I do not see how it could have been held otherwise, considering the additional words, "and of the blood," &c., and the extraordinary use of the words "next of kin," in a statute regulating the inheritance of lands. See also *McNeilledge* agt. *Galbraith* (8 Serg. & R. 40), and *McNeilledge* agt. *Barcly* (11 Serg. & R. 103), where the devise of real and personal property was to testator's wife, "and at her decease to be divided between hers and my poor relations equally."

It is evident that all that has been said about the English statutes applies to our statutes of distribution, especially to our present statute (2 Rev. Stat. 96, 97, § 75), which was worded with much more precision and distinctness than

Slomson agt. Lynch.

the English statute. Perhaps the remark in the fore part of this opinion, that the English statute of distributions originated and gave a technical meaning to the words "next of kin," requires explanation. I meant that the statute originated and gave the technical meaning contended for, with reference to the succession to or the distribution of the personal property of intestates; I did not mean that the statute originated the phrase next of kin.

- A statute of 31 Edward III, provided that in cases of intestacy "the ordinaries shall depute of the next and most lawful friends of the dead person intestate, to administer his goods." Lord COKE in *Hensloe's case* (9 Coke, 39), speaking of the statute says, "next and most lawful friends," meant the next of blood. The statute of 21 Henry VIII, chap. 5, provided that in case any person die intestate, or that the executors named in any testament refused to prove it, the ordinary should grant administration "to the widow of the deceased, or to the next of kin, or to both, as by the discretion of the ordinary shall be thought good." Lord COKE in speaking of this statute in *Hensloe's case*, just cited, says that it gave power to the ordinary to commit administration to the next of blood; but how palpably unauthorized the conclusion (*Cooper agt. Denison*, 13 *Simons*, 295, 296) from this that long after the statute of distributions, the words next of kin and next of blood, were synonymous; the very point insisted on being that the words next of kin, were likely to acquire and had acquired a technical meaning in consequence of that statute.

It is not probable that Miss Ogden, when she executed the settlement, thought of the meaning of the words "next of kin." It was natural that she should think of her anticipated issue and their children. She takes care of them by a special limitation. If she thought of her brothers and sisters, why did she not take care of them by a special limitation? It is evident that the settlement was drawn with technical precision, by one well acquainted with the

Slomson agt. Lynch.

technical meaning of legal terms and phrases. He must be presumed to have inserted the words "next of kin," in the limitation, to "the next of kin of the said party of the first part," with knowledge of their technical meaning, if they had any, and the parties by their execution of the settlement must be presumed to have adopted them with such technical meaning; and as I cannot say that I have a doubt that those words used *simpliciter*, meant and mean next of kin, under or according to the statute of distributions, including those claiming *per stirpes*, or by representation, my conclusion is that the judgment of the special term should be reversed, with costs of all parties to be paid out of the fund to be distributed, and that we should declare that the defendants, the three children of Mrs. Lawrence's deceased brother, are entitled to the share of the fund which their father would be entitled to were he living. We would not be justified in rendering blind obedience to authorities however respectable or high, which have neither the force of constitutional obligation, nor state nor national judicial precedent or approval.

I will say in conclusion, partly by way of excuse for this rather elaborate examination of a question which unembarrassed by cases would appear to be so simple, that I find in a deservedly popular law dictionary (Burrill's) the words "next of kin," defined first and most prominently "nearest of blood" (*prochein du saunk*); and even Judge STORY, in his *Eq. Juris.* (vol. 2, § 1065, b), says, "next of kin" is sometimes construed to mean "next of blood, or nearest of blood," citing *Witty agt. Mangler* (10 Clark & Fin. *supra*), without one word of comment, or of approval or disapproval.

Strong agt. Strong.

NEW YORK SUPERIOR COURT.

PETER R. STRONG agt. MARY E. STRONG.

In an action of *divorce* for adultery, the defendant on showing the court a reasonable prospect of establishing the defence, may have leave to *amend or file a supplemental answer*, by setting up the defence of *adultery* against the plaintiff, having discovered the fact after the issues in the cause were first joined.

Special Term, January, 1865.

THIS is an application to amend or file a supplemental answer alleging adultery on the part of the plaintiff. the fact having been discovered after the issues were first joined.

McCUNN, J. Under section 173 of the Code, the court has full discretion on the subject where it is in furtherance of justice, and where such amendments are clearly made in good faith. (*Cartledge agt. Cartledge*, 8 *Jur. N. S.* 493; *Smith agt. Smith*, 4 *Paige's Rep.* 435.) Although amendments owing to laches may be refused in other cases, yet in actions for divorce the privilege of amending so as to set up a valid defence, is not only allowable at any time before trial, but the court should of its own motion, require any valid defence to be interposed of which it had any knowledge (*Smith agt. Smith*, 4 *Paige*, 425).

The contract of marriage differs from all other contracts; its continuance does not depend on the will or consent of the parties. Public policy forbids that it should be judicially dissolved, unless there be in fact an adequate cause for its dissolution; the courts will not permit a marriage to be dissolved in consequence of the negligence or collusion of the parties. The statutes declare (3 *R. S.* 5th ed. p. 236, § 55) that although the offence charged be established, yet if condonation or adultery by plaintiff appear, the plaintiff shall not obtain a divorce, and for the purpose of enforcing this policy, the courts have invariably

Strong agt. Strong.

compelled parties to allege in their complaints the non-existence of every defence named in the statute (*Smith* agt. *Smith*, 4 *Paige's Rep.* 435, 436). In the case last cited, the court of chancery laid down as a rule the principle that the sacred ties of marriage cannot be dissolved by consent or negligence, when a good and valid defence exists, and the cases in the English courts are numerous in establishing this doctrine. So jealous are the English people of any encroachments on the sacred obligations of marriage, that the statute of 23 and 24 Victoria, chap. 144, was passed, making it the duty of the crown's proctor to intervene in case he suspects collusion between the parties; indeed the statutes of Victoria above cited, go so far as to allow a stranger after interlocutory judgment, to appear and show cause why final judgment should not be pronounced, by reason of any collusion between the parties, or that material facts have not been brought before the court, and the act declares that the decree shall not be made absolute in the first instance, but that a time not less than three months shall be fixed by the court to allow parties to come in and show cause why the divorce should not be granted. Under the English statutes the courts will receive evidence of the charge of collusion at any time after verdict and before final judgment, and any neglect on the part of the defendant to make the proper defence, such as adultery, is acted upon in the same manner. (*Pollock* agt. *Pollock*, 8 *Jur. N. S.* 1230; *Lautuor* agt. *Lautuor*, 31 *Law Jur. N. S. Prol. mat. and ad.* p. 66; *S. C.* 2 *Swabey & Trist's Div. Cases*, 524; *Boulton* agt. *Boulton*, 2 *Swabey & Trist's Rep.* pp. 405, 638, 639.)

Chancellor WALWORTH, in the case of *Smith* agt. *Smith*, in laying down a similar doctrine, held that the court will of its own motion act in such cases, and see that all valid reasons for not granting a divorce be fairly brought before it. The reason why courts have pursued this course is, that marriage is a contract of a peculiar nature, and they

Strong agt. Strong.

have always looked upon it as a sacred ordinance, having its origin in the divine and natural law, differing from all other contracts, for the rights and obligations arising from it are not left entirely to be regulated by the agreement of the parties, but are to a certain extent, controlled by matters of municipal regulations, over which the parties have no control; unlike other contracts, it cannot be dissolved by mutual consent, and it subsists in full force even though the parties are possessed of incurable insanity, and the state will not allow it to be dissolved except upon the complaint of an innocent party, and for the crime of the other party. Innocence on one side and guilt on the other are alike indispensable.

In this case opposing affidavits have been introduced to impeach the proposed amendments, and I think at this stage of the proceedings it would be improper for me to pass upon the question of the veracity of the witnesses, especially in a case of this nature. Witnesses on both sides in this class of cases are generally persons of tarnished reputation, for other witnesses can very rarely be obtained, and it is undoubtedly the province of the jury to pass upon the truth or falsity of their testimony. My duty on this motion is simply to ascertain whether the defendant has a reasonable prospect of establishing one of her recriminating charges; if I think she has, this alone will give her the right to amend. In the early part of the proceedings the defendant had a perfect right to interpose this defence, if she had known the facts alleged. The plaintiff is not therefore prejudiced, and her non-compliance with the rules of order in matter of practice, I am satisfied, did not arise from any disrespect to the court or from any contempt of the law.

The amendment should be allowed.

Washington Life Insurance Company agt. Lawrence.

SUPREME COURT.

WASHINGTON LIFE INSURANCE COMPANY agt. LAWRENCE, and
others.

An action for an *interpleader* under the Code, must take the same course and be governed by the same rules which controlled in chancery in such cases. No order granting the relief prayed for can be made until after all the defendants have failed either to *demur* or *answer* within the time allowed by the Code for an answer or demurrer to be served.

New York Special Term, March, 1865.

Before BARNARD, Justice.

THE plaintiff had commenced an action, which in the former chancery practice would have been a bill of interpleader, and he now, before the time to answer the complaint has expired, makes a motion for an order that the relief prayed for in his complaint be granted to him.

BARNARD, J. I think this order cannot be granted. If a plaintiff chooses to commence an action of interpleader, that action must be governed by the practice and rules which obtained in chancery in such cases. By that practice no such order as the one asked for could be granted until after the bill had been taken *pro confesso* as against all the defendants. Up to that time the defendants had a right to come in and demur to or answer the bill, and the issues raised by the demurrer or answer were then disposed of in the ordinary manner of disposing of issues; if the plaintiff succeeded on the issues, then he obtained his relief by the decree made thereon. An action under the Code for an interpleader, must take the same course. The defendants have a right within twenty days after the service of the summons and complaint on them to present their objections and defences to the complaint and the relief thereby asked, either by demurrer or answer.

An order granting such relief can only be made after all

Cotes agt. Carroll.

the defendants have failed either to demur or answer within the time allowed by the Code for an answer or demurrer to be served. On this ground, without considering the other objections urged, I think the motion should be dismissed, with costs. The plaintiff, however, may apply *ex parte* for an injunction.

SUPREME COURT.

ALBERT COTES and another, two of the Executors of, &c., of BENJAMIN RATHBUN, deceased, agt. LAURA CARROLL, JANE M. RATHBUN and GEORGE L. RATHBUN, impleaded with ANDREW R. SMITH, MINERVA E. WOOD, LOUISA RATHBUN and CALVIN P. SMITH, one of the Executors, &c., appellants.

Is an action brought by *executors* for the construction of the *will* of the testator, where several heirs and devisees claiming under the will are made defendants, and a decree or judgment of the court is pronounced allowing the claims of some of the defendants as against the others, the latter defendants on bringing an *appeal* from the judgment in order to effect their appeal, must not only serve their notice of appeal and other papers upon the plaintiffs, but also upon the *defendants who have established their claims* under the will, as these defendants are the "*adverse party*," within the meaning of the Code (§ 327).

Where such adverse defendants are not served with notice of appeal, &c., to effectuate the appeal as to them, but their attorney is served with copies of the case and notice of argument, on bringing the appeal to a hearing, the attorney thus served, may on motion, have the cause stricken from the calendar as respects the defendants he appears for, with costs.

The court has no power to allow an appeal to be taken after the time limited in the Code for bringing an appeal. Nor has it any power to extend the time to appeal. And section 327 of the Code only allows an *amendment*, where *notice of appeal shall have been given* in good faith, &c.; it applies to acts other than the service of notice of appeal (BALCOM, J., *dissenting*).

Broome General Term, January, 1865.

Present PARKER, P. J., BALCOM and MASON, Justices.

THIS action was commenced by the plaintiffs, two of the executors of Benjamin Rathbun, to obtain a judicial con-

Cotes agt. Carroll.

struction of his will. The defendants Laura Carroll, Jane M. Rathbun and George L. Rathbun (only children of Charles Rathbun, a son of deceased), appeared by Countryman & Moak, and the defendants Andrew R. Smith, Minerva E. Wood, Calvin P. Smith and Louisa Rathbun, by D. C. Bates, Esq.

The case was tried at the Otsego special term, in July, 1861. The principal questions litigated were: 1st. Whether the defendant George L. Rathbun, under the *second* and *third* clauses of the will, on arriving at twenty-one years of age, took the accumulated rents of the Wheeler farm; and 2d. Whether the defendants Laura Carroll and Jane M. Rathbun, were entitled to the interest on the \$2,000 bequeathed to each by the *third* clause, invested on interest by the plaintiffs. The defendants represented by Mr. Bates, claimed the rents and such interest went into the residuum. The court held that George L. Rathbun took the rents, and Laura Carroll and Jane M. Rathbun, were entitled to such interest. Judgment was perfected in Otsego county clerk's office accordingly, February 5th, 1864. February 27th, the four defendants who appeared by Mr. Bates, by a notice of appeal directed to the clerk and the attorney for the defendants only, appealed as against the plaintiffs. March 17th, the costs of the defendants were adjusted, and inserted in the entry of judgment. On the 13th of April, the three defendants who appeared by Countryman & Moak, served upon Mr. Bates, the attorney for the four other defendants, a copy of the judgment, with the signature of "D. A. Avery, county clerk of Otsego county," thereto, and a notice of such judgment, telling him it was done to limit the time for his clients to appeal, and that they understood the law to be that if his clients desired to affect the rights of theirs, as determined by the judgment, his clients must appeal as against theirs. He claimed he had examined the law and should not appeal as against them. No proposed case or

Cotes agt. Carroll.

exceptions was ever served upon or settled as against Countryman & Moak, nor was any notice of appeal served upon them. November 7th, Mr. Bates served upon Countryman & Moak what purported to be three copies case and notice of argument thereof for November general term at Binghamton. They returned same, and on behalf of their clients moved at that term to strike the cause from the calendar. The court intimated this must be done, and Mr. Bates thereupon asked leave to appeal for his clients as against those of Countryman & Moak.

D. C. BATES, *for appellants.*

J. E. DEWEY, *for plaintiffs.*

N. C. MOAK, *for defendants Laura, Jane M. and George L.*

I. If the defendants represented by Mr. Bates, desired to affect the rights of those who appeared by Countryman & Moak, they were obliged to appeal as against them. It would be strange indeed, if they were necessary parties to the action, and yet as soon as they had established their rights could be dropped, and their rights determined on appeal, without any right to be heard or conduct the litigation.

(a) The plaintiffs do not represent any of the defendants. All they desire is a construction. They are indifferent as to which class of the defendants succeeds (1 *Story's Eq. Pl.* § 362).

(b) The Code (§ 27, *sub.* 1) provides that "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side as between themselves." By section 327, "an appeal must be made by the service of a notice in writing on the adverse party, and on the clerk with whom the judgment or order appealed from is entered."

The precise point here involved was determined in

Cotes agt. Carroll.

Thompson agt. *Ellsworth* (1 *Barb. Ch. Rep.* 624). That was a bill filed against the mortgagor and several others, claiming subsequent interests, to foreclose a mortgage. The mortgagor admitted all the facts in the bill, but the other defendants put the complainant to proof, and were defeated. Judgment was entered against all the defendants for the entire costs. The mortgagor claimed that the costs made by the other defendants should be charged upon them only. The claim was denied, and he appealed to the chancellor, and executed a joint bond (2 *R. S.* 605, § 80) to the complainant and five of his co-defendants. The complainant moved to dismiss the appeal on the ground that the bond as to him was insufficient, and also that it should have been several. Chancellor WALWORTH says (p. 627): "The adverse party, within the intent and meaning of this 80th section, means the party whose interest in relation to the subject of the appeal is in conflict with the reversal of the order or decree appealed from, or the modification sought for by the appeal." Again: "Here the appeal is from the whole decree, and the complainant alone is interested in resisting the appellant's claim to have it entirely reversed" * * * (p. 628). "On the other hand, so far as the appellant seeks for a decree over against his co-defendants for the extra costs to which he or his interest in the mortgaged premises may have been subjected by the defence set up by their several answers, the complainant has no interest in the question, and such co-defendants are alone the adverse parties to the appellant, and they only are interested in resisting the modification of the decree in that respect." The rule was well settled. (1 *Barb. Ch. Pr.* 400, 408, 425-6, 434; 4 *Paige*, 290; *Id.* 279; 5 *Id.* 170; 9 *Id.* 70, 71; 11 *Id.* 453; 2 *Barb. Ch. Rep.* 434.) Section 471 of the Code retains the former practice in such cases.

II. The copy judgment and notice having been served on Mr. Bates, April 13, 1864, the defendants for whom he

Cotes agt. Carroll.

appeared had only thirty days from that time within which to appeal (*Code*, § 332). That time having expired, this court has no power to allow one to be now brought (*Code*, § 405). That such was the intention of the legislature is evident. By section 149 of the Code of 1848 (now section 173), it was provided that "the court may at any time, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding by adding or striking out the name of any party, or a mistake in any other respect, or by inserting other allegations material to the case, or by conforming the pleading or proceedings to the facts proved, whenever the amendment shall not change substantially the cause of action or defence." Under this section no one would claim a power to allow an appeal or extend the time to bring one, and hence section 275 of the Code of that year (now section 327), simply provided that "an appeal must be made by the service of a notice in writing on the adverse party and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the judgment or some specified part thereof." Section 366 of the Code of 1848 (now section 405), read as it now does, except that time to do any act after judgment could not be extended.

In 1849 the legislature made section 149 of the Code of 1848, section 173, and amended it by adding "the court may likewise in its discretion allow an answer or reply to be made, or any other act to be done after the time limited by this act, or by an order enlarge such time," &c. This section has not since been materially amended, except that what was added in 1849 has been made a new section and numbered 174. The legislature seems to have foreseen that perhaps under the term "or any other act to be done after the time limited by this act," it might be claimed the court had power to allow an appeal after the right to it was lost, and litigation endlessly prolonged. Regarding an appeal after one hearing as a favor (5 *How* 366; 7 *Id.* 112), to

Cotes agt. Carroll.

prevent any mistake as to their intention, they added to section 327 of the Code of 1849 (section 275 of Code of 1848, *supra*), as follows: "When a party shall give in good faith, notice of appeal from a judgment or order, and shall omit through mistake to do any other act necessary to perfect the appeal (i. e., to give an undertaking, &c.), or to stay proceedings, the court may permit an amendment on such terms as may be just," showing clearly that they did not intend to give the court power to allow service of a notice of appeal after the right to do so was gone. (5 *How.* 366; 16 *Id.* 338.) The whole act is to be taken together, and section 174 construed with reference to this declared intention of the law makers.

That this court has not power to allow an appeal or enlarge the time to bring one has been held in the following cases: (*Renouil* agt. *Harris*, 2 *Code Rep.* 71, *Gen. Term Superior Court*; *Fry* agt. *Bennett*, 16 *How. Pr. Rep.* 385, *Gen. Term Superior Court*; *De La Figanerie* agt. *Jackson*, 4 *E. D. Smith's C. P. Rep.* 477, 484; *Linsey* agt. *Almy*, 1 *C. R. N. S.* 139, *KING, J. Sp. T. 1st Dist.*; *People* agt. *Eldredge*, 7 *How.* 108, *BARCULO, J. Sp. T. 1st Dist.*; *Morris* agt. *Morange*, 26 *Id.* 247, *Gen. T. 2d Dist.*; *Enos* agt. *Thomas*, 5 *Id.* 361, 366, *Gen. T. 3d. Dist.*; *Salls* agt. *Butler*, 27 *Id.* 133, *Gen. T. 4th Dist.*; *Tripp* agt. *De Bow*, 5 *Id.* 114, *Gen. T. 7th Dist.*; *Rowell* agt. *McCormick*, 5 *Id.* 337, *WELLES, J. Sp. T. 7th Dist.*; *Ellsworth* agt. *Fulton*, 24 *Id.* 20, *WELLES, J. Sp. T. 7th Dist.*; *Marston* agt. *Johnson*, 13 *Id.* 93, *Gen. T. 7th Dist.*; *Galt* agt. *Finch*, 24 *Id.* 193, *dubitatur, Gen. T. 6th Dist.*; *Humphrey* agt. *Chamberlain*, 11 *N. Y.* [1 *Kern.*] 274; *Wait* agt. *Van Allen*, 22 *N. Y.* 319; *Wells* agt. *Danforth*, 7 *How.* 197, *Ct. Ap.*; *Bank Geneva* agt. *Hotchkiss*, 5 *Id.* 478, *Ct. Ap.*) The only cases it can be claimed hold the other way are: (*Crittenden* agt. *Adams*, 5 *How.* 310, *Sp. T. MASON, J. 6th Dist.*; *Traver* agt. *Silvernail*, 2 *Code Rep.* 96, *Sp. T. dicta by PARKER, J. who dissented in Enos* agt. *Thomas*, 5 *How.* 361, and made before that decision;

Cotes agt. Carroll.

Haase agt. *N. Y. C. RR.* 14 *Id.* 43, *MARVIN, J. Sp. T. contrary to Gen. T. and all decisions in that Dist. and overruled by Gen. T. 4th Dist.* 27 *Id.* 136; *Toll* agt. *Thomas*, 18 *Id.* 354, *HARRIS, J. Sp. T. 3d Dist. overruled by Gen. T. 4th Dist.* 27 *Id.* 136; *Seeley* agt. *Pritchard*, 3 *Duer*, 669, expressly overruled by same court, 16 *Id.* 389.)

It will be seen that there are only three special term cases holding the power exists, while the court of appeals, superior court, court of common pleas, and the general terms of the 2d, 3d, 4th and 7th districts, and numerous special terms hold the contrary. There should be uniformity in the practice, and general term decisions should be followed by other districts, unless they have already held the other way. (16 *How.* 289; 7 *Abb.* 416; 29 *Barb.* 350; 39 *Id.* 633.)

In *Wait* agt. *Van Allen* (22 *N. Y.* 319), the question of power in the court to extend time to appeal was certainly up and decided. That case originated in justice's court. At the term after decision, a motion was made for leave to go to the court of appeals. The motion was not decided until the next term, but was then granted, and finally ordered to be entered *nunc pro tunc* as of the term when the motion for leave was made. The fault if any, was the neglect of the court, and yet on motion to dismiss the appeal on the ground that the court possessed no power to thus extend the time, the appeal was dismissed, the court holding (p. 321) that as soon as the time within which an appeal could be brought had expired "the plaintiff had an absolute right to the fruit of his recovery, of which it was not in the power of the court to deprive him" (see also 16 *N. Y. Rep.* 600).

The rule is thus laid down (2 *N. Y. Pr.* 115-16) by Messrs. Tiffany & Smith: "The notice of appeal must be given properly and in good faith, within the time allowed by law for appealing, or the right is lost; the court cannot relieve the party who has omitted this; but where a party shall

Cotes agt. Carroll.

in good faith, and within the proper time, give notice of appeal, and shall omit through mistake to do any other act necessary to perfect the appeal or to stay proceedings, the court will permit an amendment." It was held in this district in the case of *People ex rel. Gilchrist agt. Field, late sheriff* (argued July General Term, 1856), that service of a copy of the order appealed from, certified as a copy by the clerk, without any notice whatever, or even the name of the respondent's attorney on it, set the time running within which an appeal must be brought, and that the right to appeal having once been lost, the court could not allow one, and the appeal brought after thirty days was dismissed.

III. Service of notice of appeal against the plaintiffs, on them and the clerk, was of no avail against these defendants. It was not sufficient to authorize the court to allow an appeal against them. Section 327 provides that "when a party shall give in good faith, notice of appeal from a judgment or order, and shall omit through mistake to do any other act necessary to perfect the appeal or to stay proceedings, the court may allow an amendment on such terms as may be just."

(a) No notice of appeal, case, exceptions undertaking or other paper relating to an appeal was served. This provision only allows an "amendment." Where nothing has been done there is nothing to amend.

(b) This applies to acts other than service of a notice of appeal, and then only when notice of appeal has been actually served on the adverse party against whom the appeal is desired, and on the clerk.

In *Tripp agt. DeBow* (5 How. 114), the notice of appeal was properly served on the clerk, and was also served on the respondent personally, instead of on his attorney. The court held the appellant had not served notice of appeal as provided by the act. In *Fry agt. Bennett* (16 How. 385), the appellant duly served notice of appeal from the judgment. Held, it could not be amended so as to make it also

Cotes agt. Carroll.

an appeal from an order denying a new trial. The court (p. 387) said, "for the purpose which the appellant has in view, two appeals were necessary, and although it may not be irregular to include both appeals in the same notice, it is authorizing an appeal where none has been taken, to allow an alteration of the notice which has been served, so as to embrace two appeals instead of one, and it can no more be done than a new and separate notice can be permitted." In *Morris* agt. *Morange* (26 How. 247), the notice of appeal was properly served on the adverse party and mailed to the clerk on the last day, but not received by him until four days afterwards. *Held* (Gen. T. 2d. Dist.), that "the notice of appeal was insufficient to give the appeal effect, and the court had no power to grant any relief to the appellant by which he could make his intended appeal effectual." So also in *Ellsworth* agt. *Fulton* (26 How. 23), the court says, "to give notice of appeal in order to give the court jurisdiction to allow the amendment under the section, means to make out the notice in writing and serve it on the adverse party and on the clerk." To serve it upon either and not on the other, is not giving notice of the appeal within the meaning of the section. This I think evident from what the omission is from which the court has power to relieve the party, which is to omit to do any other act necessary, &c. Other than what? Clearly than to give notice of appeal. No other interpretation is admissible. The only construction which would aid the plaintiff, would involve the following absurd reading of the section: "When a party shall give in good faith notice of appeal from a judgment or order, and shall omit through mistake to give notice of such appeal as required by this section, or to do any other act necessary," &c. The section is general, and relates to all appeals provided by the Code in civil cases, to which its provisions in whole or in part can be made to apply, and that part of it under which the plaintiff seeks relief was intended to apply to such cases

Cotes agt. Carroll.

as an appeal from a judgment of the supreme court to the court of appeals, where the party appealing has served written notice upon all the proper persons, but has neglected by mistake to give the undertaking, or to make the deposit as required by section 334, without which such appeal is not available for any purpose, to a case where it is necessary to have the appeal operate as a stay of proceedings, and such an undertaking has been omitted by mistake; where the judgment appealed from directs the assignment or delivery of documents or personal property, and the party appealing has inadvertently omitted compliance with such directions, which is required by section 336 as a condition of the appeal operating as a stay of proceedings, together with all other cases where something necessary to be done besides giving the notice of appeal, has been omitted from the same cause, and which is necessary to perfect the appeal or to stay proceedings."

IV. But in this case, even if the court had the power to relieve the appellants, they are clearly not entitled to a favor.

(a) Mr. Bates did not omit to serve notice of appeal on Countryman & Moak "through mistake." He did not intend to do so. He intended to do just what was done, and nothing more. *Ignorantia juris non excusat*. Ignorance of law is one thing, omission "through mistake," to do an act, quite another. In this case he knew all the facts, and elected to take the consequences. A party is presumed, indeed, bound to know the contents of a judgment from which he appeals.

(b) The law as to the effect of the appeal he brought was well settled (*Point I, supra*).

(c) He understood perfectly well the notice was served to limit his time for bringing an appeal, and insisted he would not bring one.

(d) By allowing an appeal under such circumstances, the court would hold out a premium to claims of mistake and

Cotes agt. Carroll.

other paltry excuses which can never be denied or disproved, and it is difficult to conceive a case in which a party would not be relieved.

MASON, J. There can be no doubt, I think, that the appeal in this case as to the defendants Laura, Jane M. and George L., who appeared by Countryman & Moak, their attorneys, is wholly ineffectual. As to them there is no appeal, as no notice of appeal was served upon them or their attorneys. The language of the Code is that "an appeal must be made by the service of a notice in writing on the adverse party, and on the clerk with whom the judgment or order appealed from is entered." The 60th section of the statute regulating appeals from a decree of the vice-chancellor to the chancellor, declared that an appeal from a decree or order of the vice-chancellor should "be made by serving notice thereof on the solicitor of the adverse party, and on the register, assistant register or clerk with whom the order or decree appealed from was entered" (2 R. S. 178). The only difference in these two statutes is that the one says that the appeal must be made by the service of a notice in writing on the adverse party, while the other says that it shall be made by serving notice on the solicitor of the adverse party. Now it was adjudged by the chancellor in the case of *Thompson agt. Ellsworth and others* (1 Barb. Ch. Rep. 624), that the adverse party within the intent and meaning of the statute, was the party whose interest in relation to the subject of the appeal is in conflict with the reversal of the order or decree appealed from or the modification sought by the appeal, and this it seems to me is the only sensible construction which can be put upon the statute, and it must control in the construction of the 327th section of the Code. It follows, therefore, that there is no appeal as against Laura Carroll, Jane M. and George L. Rathbun, in this case.

The only remaining question is whether we can allow,

Cotter agt. Carroll.

by way of amendment or otherwise, this notice to be served after the time for appealing has gone by, so as to make this appeal effective as against these three defendants. I held some fourteen years ago, in the case of *Crittenden agt. Adams and others* (5 *How. Pr. Rep.* 310), that this court had power under the statute to allow an appeal to be taken after the time limited in the Code. The reasons there assigned were, and are now, satisfactory to me for so holding. The language of the statute is, "the court may, in its discretion, allow an answer or reply to be made, or other act to be done after the time limited by this act." I am not, however, justified in adhering to that decision, it has been so badly shaken and repudiated by subsequent decisions in this court (2 *Code Rep.* 71; 16 *How. Rep.* 385; 7 *Id.* 108; 26 *Id.* 247; 5 *Id.* 361; 27 *Id.* 133; 5 *Id.* 114; 24 *Id.* 20; 13 *Id.* 93; 24 *Id.* 193; 7 *Id.* 197), and especially since the decisions in the court of appeals in the cases of *Humphrey agt. Chamberlain* (1 *Kern. Rep.* 274), and *Wait agt. Van Allen* (22 *N. Y. Rep.* 319). These cases certainly hold that the time to appeal cannot be extended.

There being no appeal against these three defendants, I do not see how these appellants can be helped out of their difficulty under section 327. That section provides that "when a party shall give in good faith notice of appeal from a judgment or order, and shall omit through mistake to do any other act necessary to perfect the appeal or to stay proceedings, the court may allow an amendment on such terms as may be just." This section has no application, for no notice of appeal has been given as regards these three defendants, and by this section the court can only allow an amendment where a notice of appeal shall have been given in good faith, and the party shall, through mistake, have omitted to do some other act than giving the notice of appeal, which was necessary to perfect the appeal. It is very clear to my mind that this 327th section applies to acts other than the service of notice of appeal, and the

Notes agt. Carroll.

amendment can then only be allowed when notice of appeal has been actually served on the adverse party, against whom the appeal is desired to be perfected. (5 *How. Rep.* 114; 16 *Id.* 385; 26 *Id.* 247; 26 *Id.* 23.) There is another reason why this should not be allowed here. There is no mistake shown. The party did not intend to serve any notice of appeal on these three defendants.

We must strike the cause from the calendar as to these three defendants, and refuse to hear the appeal as to any of the matters affecting their interests, with \$10 costs.

PARKER, P. J., concurred.

BALCOM, J., *dissenting* (in part). According to section 327 of the Code, "an appeal must be made by the service of a notice in writing on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same or some specified part thereof." And the main question now presented is whether the three defendants, who have not appealed from the judgment, are to be deemed adverse parties, so as to entitle them to notice of the appeal. Their interests in the case are certainly adverse to those of the appellants. They are as much interested in sustaining the judgment as the appellants are in reversing it, and the only interest the plaintiffs have in the controversy is to have it ended with the least possible expense and delay. The chancellor, in determining who was the adverse party within the meaning of a section of the Revised Statutes and a rule of his court, held that the adverse party was the party whose interest in relation to the subject of the appeal was in conflict with the reversal of the order or decree appealed from, or the modification sought by the appeal (*Thompson agt. Ellsworth*, 1 *Barb. Ch. Rep.* 624). And I am of the opinion the words "the adverse party," in section 327 of the Code, should be construed to embrace parties to the action, whose interests in relation to the judgment or order appealed from are in conflict with the reversal or modifica-

Cotes agt. Carroll.

tion sought by the appeal, and that the defendants in this case who have not appealed from the judgment, are adverse parties within the meaning of that section of the Code, and consequently were entitled to notice of the appeal. And as their interest might be affected by the manner the case and exceptions were proposed and settled, I think their attorney should have been served with a copy of the proposed case and exceptions so they could have proposed amendments thereto, and been heard on the settlement of the case, exceptions and amendments. It follows that the case is irregularly on the calendar as against the defendants who have not appealed from the judgment.

The next and only remaining question, is whether the appellants can have relief which will enable them to make their appeal effectual and valid as to all the parties to the action. Section 405 of the Code is similar to a rule of the former supreme court, which was held not to preclude the court from permitting a case not made within the time prescribed by it, to stand as if made within such time. (*See Hawkins agt. The Dutchess, &c. Co. 7 Cow. 467; 2 Grah. Pr. 2d ed. 331.*) And I am of the opinion this court possesses the power to allow the appellants' attorney in this action to serve a copy of the case and exceptions upon the attorneys of the defendants who have not appealed, and have the same re-settled, on notice to them and the plaintiffs' attorney.

It is provided by section 327 of the Code, "where a party shall give in good faith, notice of an appeal from a judgment or order, and shall omit through mistake, to do any other act necessary to perfect the appeal or to stay proceedings, the court may permit an amendment on such terms as may be just." The appellants' attorney gave his notice of appeal in good faith. It was duly served on the plaintiffs' attorney, and also upon the clerk with whom the judgment was entered. But he omitted through mistake, to serve the notice upon the attorneys of the defendants

Cotes agt. Carroll.

who have not appealed, which act was necessary to perfect the appeal. It seems to me that giving the appellants' attorney permission to serve his notice of appeal on the attorneys of the defendants who have not appealed, will not be enlarging the appellants' time to appeal, and that the court is authorized to grant this relief to the appellants by section 327 of the Code. I think the Code itself, as well as pleadings, should be construed "with a view to substantial justice between the parties" (§§ 159, 467).

My conclusions are that the cause should be struck from the calendar, with \$10 costs of the motion to be paid by the appellants, and that upon paying \$20 costs to the plaintiffs' attorney, and said \$10 costs to the attorneys of the defendants who have not appealed, within twenty days after notice of the order, the appellants should have leave to serve a copy of the notice of the appeal and a copy of the case and exceptions on the attorneys of the defendants who have not appealed, who should have ten days thereafter in which to propose amendments thereto, and that the case and exceptions should, if amendments are thus proposed, be re-settled upon notice to the attorneys so proposing amendments and the plaintiffs' attorney, and if re-settled, the same as re-settled should be substituted in the judgment roll in place of the same now in it. But if no amendments should be proposed to the case and exceptions within the time aforesaid, then the case and exceptions as now settled should remain in the judgment roll, and the appeal should be heard on the papers as they now stand, with a copy annexed thereto of the notice of the appeal, directed to the attorneys of the defendants who have not appealed.

Van Wert agt. The City of Brooklyn.

SUPREME COURT.

PHOEBE VAN WERT agt. THE CITY OF BROOKLYN.

LAVINA TOWNSEND agt. THE SAME.

A *municipal corporation* is not liable for *negligence* in the construction of a public work, although such work was done under a contract duly executed by its proper authorities—and

Unless it affirmatively appears that an owner of real estate in making a contract for the improvement of his property by the erection of new buildings or the alteration of those already erected, has required some improper act to be done, or has omitted some ordinary or proper precaution, he cannot be charged with improper conduct or negligence, and is not liable for the consequences of negligence in the prosecution of the work.

A *municipal corporation* is not liable for the consequences of negligent acts of firemen, or workmen employed by them to erect buildings on property of the city occupied by an engine company. Neither the fire company nor the builders are the agents or employees of the city for such purpose, nor is the city liable for their acts.

Brooklyn General Term, February, 1865.

Before BARNARD, SCRUGHAM and LOTT, Justices.

THE above cases were both founded on the same circumstances, which were as follows: In November, 1863, Fire Engine Company No. 17, W. D., city of Brooklyn, built an additional story on their engine house. The work was done under contract made by the company with Snediker & Patton, builders, who sub-let the same to one Kenny. One side wall and the rear wall of the building were run up, the roof resting on them only; the other side wall was built up to within about a foot of the roof, the front wall was not raised at all. The building remained in this insecure condition for some time, the unfinished walls unbraced. While in this condition on the occasion of a violent storm, one of the side walls fell or was blown down upon an adjoining building owned and occupied by plaintiffs, severely injuring the same, for which damage this action was brought against the defendant, the owner of the engine property.

Van Wert agt. The City of Brooklyn.

The actions were tried before J. H. Calahan, justice of the peace, Brooklyn, who gave judgment for plaintiffs, which judgment was affirmed by the Kings county court, when the following opinion was given :

DIKEMAN, County Judge. By the return of the justice, it appears that by agreement of counsel, the testimony taken in the first above entitled action should be deemed as taken in, and apply to the second. The pleadings before the justice were informal, but it appears by the return and admissions of counsel on the argument, that Phoebe Van Wert is the owner, and Lavina Townsend the tenant and occupant, of a house fronting on Jay street, in the city of Brooklyn, and that adjoining said house the defendants own a lot, on which they some six or seven years since, erected an engine house, which has ever since been used and occupied by a fire company of said city—a fire engine being kept therein, all in charge of a fire company; that some time in 1863, the defendants on the petition of the fire company, authorized some internal alteration and repair to be made on the engine house, but did not authorize any elevation of the building, or of its roof or wall, nor were they requested to have any such elevation made; that in the latter part of August, 1863, the fire company made a contract with certain builders to raise the roof and build up walls twelve or fifteen feet high on the top of the original walls, adding one story to the building, and paid the contractors for the same by subscription of the company, \$1,750; that said contractors under this agreement with the fire company, raised the roof and carried up the wall of the engine house, adjoining the house of the plaintiff, to within about two feet of the height to which the roof had been raised, and the other side and wall up to the roof; that while in this situation, an unusual strong wind blew down the wall adjoining the plaintiff's building, and it fell upon the plaintiff's house, by which I am satisfied both of the plaintiffs were injured, each to the amounts respect-

Van Wert agt. The City of Brooklyn.

ively, for which the justice gave judgments in their favor against the defendants.

There is some evidence to show that this wall before it fell, had been braced for the purpose of preventing its falling; but it fails to satisfy me that all reasonable care was taken, and all reasonable means used to prevent the injury which the plaintiffs have sustained; and if under the facts above stated, the defendants are legally liable for the negligence or unauthorized acts of the fire company and the contractors who raised said wall, the judgments of the justice must be affirmed, otherwise they must be reversed. In the case *The Mayor, &c., of Albany, plaintiff in error agt. Simon Cunliff, defendant*, in the court of appeals (2 Comst. 165), in which the defendant had sued the plaintiffs in the supreme court, for injuries sustained by the falling of a bridge, which it was alleged had been negligently constructed by the plaintiffs, it was held that the plaintiffs were not liable; Cady, J., saying that it appears that the bridge had been erected under a void act of the legislature, and that to render them liable it should be shown that they were lawfully required or authorized to make the bridge. Bronson, J., says: Though the work was done by the plaintiffs, the bridge was built for the pier owners, and that they only were under obligation to keep it in repair, and that there was no color of authority for an action against the plaintiffs; that the city were no more than builders for pier owners, and if they did not build with proper care and skill, they may be answerable to the owners of the bridge, but not to third persons; their remedy is against the owners of the bridge, who are bound to repair; that if the injury had happened while the plaintiffs were constructing the bridge, and through any want of care and skill on their part, the city might have been answerable, but the bridge had been completed and in charge of pier owners more than three years before it fell and injured the defendant; that the builder is only answer-

Van Wert agt. The City of Brooklyn.

able to those for whom he builds for injuries accruing after his work is done, and the owner in possession; but the owner, upon whom the duty of maintaining the structure rests, is answerable to third parties for the sufficiency of the work, whether he has been injured by the builder or not; and assuming that the act under which this work was done by the plaintiffs was valid, there is no foundation for the action. STRONG, J., concurs in the opinion that the corporation could not in that case be made liable to third persons.

The injury to the plaintiffs in these actions accrued while the work was being performed, and the engine house in the actual possession of the defendants, under the care and custody of the fire company. Under the testimony, neither the fire company nor the builders who erected the wall, can be considered as the agents or employees of the defendants in building it, and therefore, the defendants cannot be held liable as for injury resulting from the carelessness of workmen employed by them in the performance of work which they were required or authorized to do or have done. But I apprehend the defendants are liable to these plaintiffs upon an entirely different and well settled principle of law, and that is that all owners of real property, and especially where the property is actually improved and occupied by the owner, is bound so to use it as not to injure the property of other persons; and that any improper or careless use of it, whether by the owner personally, or by a person or persons by him put in charge of it, creating a liability to produce injury to others without their fault, will, when the injury actually occurs, render the owner liable to the party injured for damages resulting therefrom. Nor can the owner of property so improperly used, escape such liability, though it appears that the act complained of was done by a person he had put in charge of the property for care and safe keeping; this liability cannot be shifted from the owner to the person he has thus

Van Wert agt. The City of Brooklyn.

employed ; the possession and control of the property by such person must in such case be held to be the possession and control of the owner—the owner holding the right not only to direct him what to do or not do, but to discharge and dispossess him at pleasure. Though there is no positive evidence to show that the defendants knew of the progress of this work prior to the injury of the plaintiffs, it is not too much to say that the testimony shows a state of facts from which it might reasonably be inferred that they did know. The timbers by which the roof of the building was raised, were placed in the street opposite the engine house in Jay street, a public street in the heart of the city, two weeks before the injury occurred ; the defendants had authorized certain internal improvements or repairs to the house to be done ; every step in the progress of the work of raising the roof and carrying up the wall must have been open and exposed to the view of all persons passing by, and after this injury occurred, a circumstance which must have become notorious, the work is allowed to progress to completion without any prohibition or remonstrance of the defendants. If the defendants did not know of the progress of this work, it must be because when they put a fire company in possession of an engine house, they do it with the express or implied understanding that the company shall be left to do as they please with it, without oversight or control by the corporation or its officers.

The roof was raised and the rear and side walls carried up in the latter part of October and early part of November, 1863, a season of the year when heavy easterly winds usually occur ; at the time of injury the easterly front wall had not been elevated at all, thus leaving the side walls much more liable to be blown down than they would have been if no roof had been over them, and besides the wall next to the plaintiff's building was but eight inches thick, which was a violation of an ordinance of the defendants, long before passed. All conspire to show that much more than

Van Wert agt. The City of Brooklyn.

ordinary care was required to prevent the falling of this wall, and that the injury resulted from great carelessness, as well as disregard of duty and law. The judgment in favor of the plaintiff, Phoebe Van Wert, is \$; and the judgment in favor of the plaintiff, Lavina Townsend, is for \$; amounting together to \$.

The property of the defendants has been improved to the amount of \$1,750, or to that amount of cost to the fire company, without cost to the defendants, and they are called upon to pay the above sum of \$, for damages resulting from what has been proved to be a nuisance, which for want of proper care on their part to prevent, they have allowed to be erected upon their property. There is no equity in their resisting these claims, and I think there is no law to shield them from payment. (8 Barb. 358; 2 Denio, 433.)

The judgments must be affirmed, with costs.

From this decision an appeal was taken to this court.

SIDNEY V. LOWELL, *assistant corporation counsel, for appellants.*

I. In order to charge the city in an action for negligence in the performance of a public work, the law must have imposed a duty or conferred an authority to do such work, and which authority must be carried out by the proper city officers in the manner the law directs. (*The Mayor, &c., of Albany* agt. *Cunliff*, 2 N. Y. 165; *Hanvey* agt. *City of Rochester*, 35 Barb. 177; *Hickok* agt. *Trustees of Plattsburgh*, 15 Id. 427; *Boylard* agt. *Mayor, &c., N. Y.* 1 Sand S. C. 27; *Thayer* agt. *City of Boston*, 19 Pick. 511; *Mitchell* agt. *Rockwell*, 41 Maine, 363; *Green* agt. *City of Portland*, 32 Id. 431.)

The work in question could only lawfully be done under a contract authorized by the common council, and made by the board of contracts. This is expressly provided by

Van Wert agt. The City of Brooklyn.

the city charter (*Laws* 1862, *chap.* 63, § 33, *sub.* 3). No authority was given by the common council to make the improvement in question. The work was not done under contract with the board of contracts. It was proved on the trial that the work was done and paid for by the engine company, under a contract with them. Therefore, under every rule of law regulating the liability of municipal corporations, for the results of negligence in the construction of public works, the defendant is not responsible herein.

1. The law had conferred no authority upon any city officers to perform such work.

2. The work was not done by the city, or authorized by it, as provided by law.

The argument of the plaintiffs that the defendant assented to the prosecution of the work in the manner aforesaid, and by their conduct allowed the plaintiffs to be damaged, and that by the assent aforesaid of the city officers, the corporation is estopped from raising the above objections, has no force. The officers of the city having no power to assent to what they could not do directly, or to bind the city by such acquiescence.

Justice STRONG, in *The Mayor, &c., of Albany agt. Cunliff*, above cited (a suit brought to recover damages accrued through the insufficient construction of a bridge by the city of Albany), said: "If the common council could not, under the circumstances, bind the corporation expressly *a fortiori*, they could not bind them by way of estoppel." (*Brady agt. Mayor, &c. N. Y.* 20 *N. Y.* 316; *Hodges agt. City of Buffalo*, 2 *Denio*, 110; *Boom agt. City of Utica*, 2 *Barb.* 104.)

II. The negligence complained of (if any) was that of the contractor's servants, for which the city is not responsible. The city had no control over his workmen, or superintendence of their work, and for the consequences of his or their acts, the defendant would not be responsible even if he was acting under a contract with the city. The

Van Wert agt. The City of Brooklyn.

negligence (if any) in this case, was that of the man who did the mason work for the contractors for the whole job. He was the servant of the contractors, and for his negligence they are liable. He is also liable individually. As the contractors are undoubtedly liable for the acts of their servants, the city cannot also be liable.

The court of appeals say : " Another condition to be regarded in the application of the rule of *respondet superior* is, that there can be but one responsible superior for the same subordinate at the same time, and in respect to the same transaction." (*Blake agt. Ferris*, 1 Seld. 56, and cases there cited ; see also *Pack agt. Mayor, &c. of N. Y.* 4 Seld. 222 ; *Kelly agt. Mayor, &c. of N. Y.* 1 Kern. p. 432, which follows the rule laid down in above cases, and *Stevens agt. Armstrong*, 2 Seld. 435 ; *City of Buffalo agt. Holloway*, 4 Seld. 435 ; *Gent agt. The Mayor, &c. Sel. notes*, No. p. 68 ; *Gourdier agt. Cormack*, 2 E. D. Smith, 254 ; *Lockwood agt. Mayor, &c. 2 Hilton*, p. 66 ; *Hanvey agt. City of Rochester*, 35 Barb. 177 ; *Norton agt. Wiswall*, 26 Id. 618 ; *Weyant agt. N. Y. & Harlem RR. Co.* 3 Duer, 360 ; *Blackwell agt. Wiswall*, 24 Barb. 355 ; *Boom agt. City of Utica*, 2 Id. 104 ; *Storrs agt. City of Utica*, 17 N. Y. 104 ; *Benedict agt. Martin*, 36 Barb. 288 ; *Potter agt. Seymour*, 4 Bos. 140 ; *Gilbert agt. Beach*, 5 Id. 445 ; *O'Rourke agt. Hart*, 7 Id. 611 ; all of which cases follow the rule laid down in *Blake agt. Ferris*.)

III. The theory conceived by the county judge, on which he affirmed the judgment herein, viz. : That the defendants are liable as owners of the property, for damages resulting from the improper use of the same, has of course for its basis the same facts as the theory on which the plaintiff contended. It is merely seeking to show a liability arising from the circumstances of the case by viewing them from a different stand point, while he himself admits that on such facts the court of last resort has held a defendant not liable. as stated in second point, viz. : that the person who

Van Wert agt. The City of Brooklyn.

actually performs the work negligently and improperly, is alone liable for any damage occasioned thereby.

GEORGE THOMPSON, *for respondents.*

I. By the city charter, it is made the duty of the common council to control and govern the firemen and fire companies of the city, to provide them with engine houses, and to control said houses (*Charter, title 2, § 13, sub: 3*). Also to prohibit and abate nuisances (*Title 2, § 13, sub. 9*).

The firemen and fire companies being under the control and management of the common council, and the engine houses under their regulation and control, the fire companies occupying such engine houses are not tenants, but rather servants or agents of the common council. As such servants or agents, so occupying the engine houses, their acts would in many respects bind the city. At least, notice to them as occupants for and under the city, of transactions and proceedings connected with the building, would be notice to the city. (*Bank of U. S. agt. Davis, 2 Hill, 431; Weisser agt. Denison, 10 N. Y. 68.*) The defendants being thus presumed to know of the alteration of the building by raising the walls, are presumed to assent to and countenance it, and are responsible for the consequence of the improper and unsafe method of its execution.

II. The city is bound to take cognizance of all matters placed under their charge and control, such as streets, wharves, public buildings, engine houses, &c. The duty imposed upon it requires frequent and constant care and attention to guard not only from the defects of dilapidation from time to time, and injuries by the elements, but to prevent unauthorized and even hostile acts of use and occupation, injurious to the public, such as the erection of structures, barriers and impediments thereon, calculated to injure private individuals, and the city is responsible for damages arising from such causes. (*Wendell agt. Mayor of*

Van Wert agt. The City of Brooklyn.

Troy, 39 Barb. 329; *Grant agt. City of Brooklyn*, 41 Barb. 381.)

When such injurious acts are committed by the direct authority, or with the knowledge of the common council, no matter how short a time intervenes between the act and the accident, the city is liable; but when no direct authority or knowledge by the city of such injurious acts can be shown, their knowledge and authority is presumed, after the lapse of a reasonable time. In the case of a street obstruction, a few days would be amply sufficient to presume such notice, and to incur the liability arising therefrom. In the case of an engine house, occupied by the servants and agents of the city, such presumed notice would be at least equally speedy. The question of the want of action of the board of contracts, and the regularity of the proceedings for the act complained of, though constituting a good defence to a suit for labor and materials expended thereon, has nothing to do with the tortuous and negligent acts of the city, except to increase and aggravate them.

III. Aside from the obligation to control, direct and guard its own property, the charter imposes upon the common council the duty of prohibiting and abating nuisances generally. The city also incurs an equal liability with other land owners and occupants, for the erection and continuation of nuisances upon its premises. The control and management of the engine house being given by law to the city, the legal occupancy was by the city and not by the company, and the city is directly amenable for the damages resulting therefrom, in the same manner as private individuals. The previous remarks with regard to presumed and actual notice, are applicable to this head.

By the court, LOTT, Justice. Assuming, as was probably done on the trial, that the fire engine house and lot on which it is erected, were owned by the defendant, that is

Van Wert agt. The City of Brooklyn.

no proof that the alteration or raising of the building was done by or for it. On the contrary, the evidence shows this was done by the engine company, and that the defendant had no connection whatever with the work. The county judge therefore properly came to the conclusion that "under the testimony, neither the fire company nor the builders who erected the wall, can be considered as the agents or employees of the defendants in building it, and therefore, the defendants cannot be held liable as for the injury resulting from the carelessness of workmen employed by them in the performance of work which they were required or authorized to do or have done." He, however, affirmed the judgment in favor of the plaintiffs, on the principle as stated by him, "that all owners of real property, and especially where the property is actually improved and occupied by the owner, are bound so to use it as not to injure the property of others, and that any improper or careless use of it, whether by the owner personally, or by a person or persons by him put in charge of it, creating a liability to produce injury to others without their fault, will, when the injury actually occurs, render the owner liable to the party injured for damages resulting therefrom."

Conceding the principle laid down by him to be correct, I do not see how it can on the facts in this case be applied to sustain the judgment. It assumes the right of an owner to use his own property properly, and a liability to a party injured thereby, is based on an improper or careless use of it. If the defendant had authorized and actually contracted for the performance of the work which resulted in the injury complained of, that could not be construed into an improper or careless use of the property. Every owner of real estate, has the right to improve it either by the erection of new buildings thereon, or the alteration and improvement of those already erected. That right is generally exercised through the agency of other persons

Van Wert agt. The City of Brooklyn.

employed to do the necessary work, and unless it affirmatively appears that in making the contract for its execution some improper act was required to be done, or some ordinary or proper precaution was improperly omitted, it is difficult to see how the owner can be charged with improper conduct or negligence. There is nothing in the case before us to show or justify the conclusion that the defendant, even if the contract under which the work was done had been made by competent authority to bind it, could be charged with the improper or careless use of the property. So far as appears, there was nothing unusual in its provisions, or that it contains anything more or less than was necessary or proper to do the work properly.

The effect of the decision of the court below is to hold the defendant to a greater liability, although the work was done without its authority, and under an agreement with the company, than if it had been done by its express direction, and under a contract with its proper officers, duly executed. The contract was made with Snediker & Patton, builders. They, it appears, employed Kenny to do the mason work, and the injury to the plaintiffs resulted from the negligent execution of that work, and not from any fault or misconduct of Snediker & Patton. Under such circumstances the defendant would not have been liable. The injury was done while the work was in progress, by a party over whom the defendant had no control, and for whose acts it was not responsible. If an express authority to do the work would not have created a liability to the plaintiffs, a mere acquiescence in its performance could not, and we are led to the conclusion that the plaintiffs have sought redress from a party without fault, and that the recovery is wrong.

The judgment of the justice and of the county court, affirming the same, must be reversed, with costs of the appeals to the county court and in this court.

Ireland agt. Johnson.

COUNTY COURT.

STEPHEN IRELAND, respondent agt. JEFFERSON JOHNSON,
appellant.

The giving of the *promissory note* of the purchaser of personal property for over \$50, to the vendor for the purchase price thereof, is not a *payment* within the statute of frauds, so as to pass the title to the property to the purchaser.

Chenango County Court, January, 1865.

THIS was an action of trover, originally brought in a justice's court, in which court the plaintiff recovered a judgment, from which judgment the defendant appealed to the Chenango county court, and the cause was tried in the county court in December, 1863, before Hon. DWIGHT H. CLARK, County Judge, and a jury. The jury, under the charge of the judge, rendered a verdict in favor of the plaintiff and respondent, for \$100. On the trial in the county court, the following facts appeared: About the last of August or first of September, 1863, the plaintiff called upon the defendant for the purpose of examining a threshing machine, with the view of purchasing it. After some negotiation in regard to the machine, the defendant agreed to sell the plaintiff the machine for \$90, and to take the plaintiff's note for that amount, payable the first day of April, thereafter, with interest. Not having any stamps to put on the note, it was agreed by the parties that the plaintiff was to go to the store of one Davis, in the same town, on his way home, and execute the note, and leave it there, and the defendant was to call and get it, and the plaintiff was to call at the defendant's and get the machine at a future day. The plaintiff executed the note, and left it at the store of Davis, as he had agreed. A few days afterwards he sent one Richards, his son-in-law, for the machine, to the defendant, who refused to deliver the machine to the plaintiff on the ground that he did not con-

Ireland agt. Johnson.

sider the note good. The defendant had not taken the note from Davis' store.

At the close of the plaintiff's evidence, and also at the close of the evidence in the case, the defendant asked the court to nonsuit the plaintiff, on the ground that the agreement to sell the machine to plaintiff was void by the statute of frauds, there being no delivery of the property, no payment made, and no memorandum in writing made of the contract and signed by the parties, the property being worth over \$50. The court refused to nonsuit the plaintiff, and the defendant excepted. The counsel for the defendant also asked the court to charge the jury that the plaintiff could not recover, for the same reason. The court refused so to charge the jury, and defendant's counsel excepted.

The court charged the jury, among other things, that if they believed the facts as alleged by the plaintiff, that the plaintiff upon executing and leaving his promissory note of \$90, payable the first day of April, with Davis, and Davis receiving the same, was in the same position as if he had left the note with defendant and defendant had received the same. That such delivery to and acceptance by defendant, in the absence of fraud or misrepresentation, would have constituted a payment, so that the title to the property would have passed to the plaintiff, and an action would lie by him for the non-delivery thereof. The defendant's counsel excepted to that part of the charge which stated that the delivery of the note to Davis was a payment for the machine, and made the agreement valid, and the machine the property of the plaintiff, and he could recover the value thereof of the defendant.

The defendant now moves for a new trial on a bill of exceptions.

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SAYRE & WINSOR, *for defendant and appellant.*
J. W. GLOVER, *for plaintiff and respondent.*

Ireland agt. Johnson.

By the court, H. G. PRINDLE, County Judge. The main question in this case is whether the giving of the promissory note by the plaintiff, for the purchase price of the machine, was a payment of the purchase money, and took the case out of the operation of the statute of frauds. The statute requires some part of the purchase money to be actually paid. Can the giving of one's own promissory note on the purchase of property, in any sense be considered a payment? Is it anything more than a promise to pay? It seems to be well settled in this state that the giving of a promissory note by the debtor on the purchase of property, is not a payment of the debt, and I am unable to see how in connection with the statute of frauds it can have the effect of an actual payment of the purchase money, when it is not regarded as payment in any other case. In *Van Steenburgh agt. Hoffman* (15 Barb. 31), the court held that the giving of a promissory negotiable note is not *prima facie* payment of a pre-existing debt. In *Waydell agt. Secor* (3 Denio, 416), Senator Lorr, who delivered the prevailing opinion in that case, said: "I concede that the note of a debtor himself will not discharge a precedent debt, though it may suspend the remedy. Yet I consider it to be equally well settled that the acceptance by a creditor of the note of a third person for an existing indebtedness, operates as an extinguishment of the original consideration, when agreed to be accepted in full satisfaction." It seems to be well established that there is a distinction between the giving of one's own note and the note of a third person. In the one case it is the mere promise of the purchaser to pay, and in the other it is the actual transfer of a debt or claim against a third person, which if agreed to be taken as payment, actually extinguishes the debt and discharges the liability of the purchaser, while in the other no new liability is created by the giving of one's own note, and no liability is extinguished or in the least changed, the debt remaining unpaid,

Ireland agt. Johnson.

and the creditor simply has the promise of the debtor in writing to pay the amount agreed upon at the time fixed. It would simply change the nature of proof when the creditor attempted to enforce collection; in the one case he would prove the signature to the note, and in the other the contract between the parties.

A parol contract to sell personal property or choses in action for the price of \$50 or more, is void, even where there is an agreement to indorse the price of the property or claim on a note or other obligation held by the purchaser against the vendor, or an agreement by the purchaser to give the vendor credit on an account held by him against the vendor, unless the indorsement has been actually made or the credit given on the account. (*Ely agt. Ormsby*, 12 Barb. 570; *Artcher agt. Zeh*, 5 Hill, 200.)

In these cases the argument is as forcible to maintain that they are not within the statute, as in the case of giving of the note by the debtor for the property purchased. In these cases there is a promise to make indorsement and give the credit, but until the indorsement is actually made or the credit given, there is nothing in the least to change the rights or liabilities of the parties; in each case it is a mere naked promise to pay or do what would amount to payment if done, neither of which, in my judgment, can have the effect of an actual payment of a part of the purchase money under the statute, and if I am correct in the view I have taken of the law, the plaintiff in this case should have been nonsuited. The defendant could not have enforced payment of the note given for the machine without a delivery of the property, as the whole bargain was void by the statute of frauds, and there was no consideration for the note.

The authorities relied upon by the plaintiff's attorney were *Chitty on Contracts* (8th ed. 348), where Chitty says: "The delivery of a bill of exchange or promissory note on account, or in payment of the price of goods sold under a

Ireland agt. Johnson.

parol contract, will take the case out of the statute, such instrument amounting to payment till dishonored;," and 10th *Petersdorf's Abridgment*, 129, note, saying: "The delivering of a bill of exchange or promissory note in part payment, would take the case out of the statute." In the case of *Combs agt. Bateman* (10 *Barb.* 574), the learned justice who delivered the opinion of the court commented on these cases, and said: "This doubtless refers to a bill of exchange or promissory note of a third person, and not of the purchaser. The delivering of the note of the purchaser can in no sense be said to be a payment. It may suspend the right of action of the seller for the purchase money until the maturing of the note, but the absolute liability of the purchaser remains. Not so, however, in all cases of the delivery of the obligation of a third person. That, when agreed to be taken in satisfaction, is an absolute payment, and in all cases the purchaser's liability is contingent." I regard this decision as authority in this case, and that it correctly settles the principle involved. I entertain great respect for the opinion of his Honor Judge CLARK, before whom this cause was tried, but his decision on the motion to nonsuit was made necessarily without a full examination of the authorities bearing upon the question. After a careful examination of the question I am of the opinion that the contract was within the statute of frauds, and that the giving of the note was not a payment of the purchase money, and that the learned judge who tried the cause erred in refusing to nonsuit the plaintiff.

The motion for a new trial is therefore granted, with costs to abide the event.

 Gibson agt. Stone.

SUPREME COURT.

GIBSON, and others agt. STONE, and others.

A *provisio* by the defendants to hold the proceeds of certain goods for the benefit of the plaintiffs, does not give the plaintiffs a specific *lien* on the goods themselves. And if the defendants, instead of selling the goods for cash and remitting the proceeds to the plaintiffs, appropriated them to the payment of their debts, the plaintiffs would have no more right to follow them into the possession of the creditors, than they would have to follow the proceeds in case the defendants sold the goods for cash and appropriated the money to the payment of the same debts. In either case it is alike merely a violation of a promise, for which they are personally responsible to the plaintiffs.

In order to constitute an *equitable assignment* of the goods to the plaintiffs, they must show an *intent* on the part of the defendants to *surrender all control* over the goods.

Where a *partner* having disposed of his share of the good will of the establishment, the *new firm* agree to allow him half yearly, one per cent upon the gross sales of the firm, this *per centage* does not constitute him a member of the new firm.

New York General Term, February, 1865.

Before INGRAHAM, P. J., CLERKE and SUTHERLAND, Justices.

APPEAL from a judgment at special term.

G. BAINBRIDGE SMITH, *for plaintiffs.*

MARTIN & SMITHS, *for defendants.*

By the court, CLERKE, J. I concur with the referee in the opinion, that the three letters of December 29, 1860, January 11 and January 29, 1861, did not create a specific *lien* upon the goods mentioned in these letters. The first letter states that the New York house should hold the proceeds of the sales of certain goods for the plaintiffs' account, as security for the payment of their acceptances of Messrs. James Black & Co.'s drafts for £5,000 each, drawn as an advance against the above-mentioned shipments. The second letter of January 11, 1861, written by the plaintiffs to Messrs. Stone & Co., of New York, stating that they handed the latter the two acceptances for £5,000 each, as advances on the goods, and which, according to an arrange-

Gibson agt. Stone.

ment with the house of Stone & Co., in Manchester, were to be held in trust for the payment of the said two acceptances.

The third letter, dated 29th January, 1861, written by Stone & Co., of New York, to the plaintiffs, acknowledges the receipt of the letter of the 11th, which they say advises them of the acceptances, and indicates the goods to be held in trust for the payment of the acceptances. Taking these letters together, they simply amount to a promise, on the part of Stone & Co., to hold the proceeds of the goods for the benefit of the plaintiffs. It gives them no specific lien on the goods themselves, and if Stone & Co., instead of selling the goods for cash and remitting the proceeds to the plaintiffs, appropriated them to the payment of their debts, the plaintiffs have no more right to follow them into the possession of the creditors, than they would have to follow the proceeds, in case Stone & Co. sold the goods for cash and appropriated the money to the payment of the same debts. In either case it is alike merely a violation of a promise, for which they are personally responsible to the plaintiffs.

No intent is shown on the part of Stone & Co. to surrender all control over the goods; and this, according to all the authorities is necessary, in order to constitute an equitable assignment. All that Stone & Co. have said in the letters of 29th December, 1860, and of 29th January, 1861, amounts, I repeat, only to a promise to hold the goods in trust for the benefit of the plaintiffs, and to pay the proceeds to them, giving to the plaintiffs no equitable assignment, and still more clearly no pledge or mortgage. Stone & Co. retained throughout complete control over the goods. I also am decidedly of opinion that the referee correctly found that Henry A. Stone was not a partner with Stone & Co. As a creditor for the loan of \$100,000 he received seven per cent. as a previous member of the firm. Having disposed of his share of the good-will of the

People *ex rel.* Lumley agt. Lewis.

establishment, the new firm agreed to allow him, half-yearly, one per cent. upon the gross sales of the firm, precisely as they might have allowed any agent for procuring customers a similar percentage. In this agreement they expressly declare that Henry A. Stone has no interest in the commission, guarantee or profit and loss, and that he is in no wise a partner or to be allowed to have any part or control in the business of the house.

The judgment should be affirmed with costs. .

COURT OF APPEALS.

THE PEOPLE *ex rel.* JOHN LUMLEY, and another agt. MORGAN LEWIS and others, Commissioners of Highways of the Town of Cherry Valley.

Where a return has been made to an *alternative writ of mandamus*, and issues are joined thereon, the case becomes an *action* under the Code, as distinguished from a special proceeding (*affirming decision of the general term, ante*, 159). An appeal will not lie to the court of appeals from an order of the general term, upon questions of the *adjustment and taxation of costs*.

September Term, 1864.

THIS appeal was brought on behalf of the defendants, from an order of the general term of the supreme court in the sixth district, denying a re-taxation of costs (*reported ante, p. 159*). The relators moved to dismiss the appeal.

E. COUNTRYMAN, *for motion*.

D. C. BATES, *contra*.

By the court, DAVIES, J. The reversal by the general term of the order of the special term, was in effect an affirmance of the adjustment and taxation of costs. From this order of the general term the defendants have appealed to this court, and the relators move to dismiss the appeal.

People *ex rel.* Lumley agt. Lewis.

The judgment entered upon the writ of mandamus in this action is reviewable in this court, and upon the appeal from such judgment this court has power to review any intermediate order involving the merits, and necessarily affecting the judgment (*sub. 1, of § 11 of the Code*). The intermediate order herein referred to, is any order of the character described, made in the action after the commencement of the same and before final judgment entered. The order appealed from in this action was made after judgment, and does not, therefore, fall within the provisions of this part of the Code, neither is it embraced in subdivision two of the same section. It is not an order which in effect determines the action, and prevents a judgment from which an appeal might be taken to this court. It is not a final order made in a special proceeding, for this is an action. Neither is it a final order made upon a summary application in an action after judgment. The order appealed from, therefore, does not fall within any classification of orders appealable to this court, as defined by the Code.

But a conclusive objection to the appeal is that this court does not review questions upon the adjustment and taxation of costs. Orders made for re-adjustment or re-taxation, or orders made affirming such adjustment and taxation are not appealable to this court. Such has been the well settled practice of this court. (3 *How.* 426; 10 *How.* 353.)

The application should be dismissed with costs. Decision accordingly.

Loonam agt. Brockway.

NEW YORK SUPERIOR COURT.

THOMAS LOONAM, appellant agt. WILLIAM E. BROCKWAY,
respondent.

A master is not liable for injuries to his servant while using machinery in the employment of the master, if the servant has the same means of knowledge of its safety as the master; and at or before the time the accident occurred there was nothing to indicate any danger such as demanded or suggested precautions which were omitted.

General Term, December, 1864.

Before MONCRIEF, GARVIN and McCUNN, Justices.

THIS action came on to be tried before one of the justices of this court and a jury; upon the plaintiff resting his case, the defendant moved to dismiss the complaint, and the court granted the motion. The plaintiff excepted. Whereupon the exceptions were directed to be heard at the general term in the first instance, and the entry of judgment in the meanwhile to be suspended.

EDWIN JAMES, *for appellant.*

H. T. BUCKLEY, *for respondent.*

By the court, MONCRIEF, J. It was said in *Cook agt. Ball* (30 *Jur.* 75 20 *D. P.* 137), "this case was tried before a justice of this court and a jury, and the argument was then as now very fully gone into. But, although the case was then fully heard and fairly tried, we do not regret that this appeal was taken and discussed at great length, for it enables us to review the whole matter in a case where our leaning, if any, will naturally be with the plaintiff. When the labor to be performed is hazardous, it is fair to presume that it is also more than usually remunerative. This was not an action for injury arising from defect of machinery, or any defect of that nature; the plaintiff wrought, it may

Leenam agt. Brookway.

be, under constant peril ; that danger and peril were the ordinary condition of that species of labor."

The learned counsel for the plaintiff conceded that this action was not brought for an alleged defect of machinery, but contended, as the complaint avers, that it was, in fact, the duty of the defendant to take due and proper care, and to provide all proper means to insure the reasonable safety of the plaintiff as his servant, in the use and application of the said steam, &c., and alleges that the want of a guage to check and control the power and quantity of steam was negligence on the part of the defendant, for which, in law, he must respond in damages to the plaintiff. There is no allegation that the defendant knew, or ought to have known, of anything omitted necessary for the protection of the plaintiff in the use of the steam, or that he was as well aware of the danger in its use as the plaintiff himself. The facts out of which the alleged duty of the defendant arises are not stated ; it does not proceed from statute, as in England, with reference to fencing machinery, nor by contract, express or implied, as the apparatus was not defective, and was in the same condition at the time of the accident as it was when the plaintiff began his employment. The liability of the defendant would arise only from the fact that he was the cause of the injury by employing his servant in work, knowing that the machinery by which he carried on the work could not be safely used for that purpose, and that its use was accompanied by risk and danger (*Potts agt. Plunket, Amer. Law Regis. vol. 7, p. 553.*). Such knowledge on the part of the defendant is the gist of the action. In England, a declaration without such an averment would be held bad on demurrer. (*Vose agt. L. Y. R. Co. 27 L. J. 249 ; 2 Hur. & Nor. 213 ; 4 Jur. 769 ; 25 L. J. 339 ; Williams agt. Clough, 3 H. & N. 258 ; Priestley agt. Fowler, 3 M. W. R. 1 ; Potts agt. Plunket, supra, and Irish Jurist.*)

It has been held otherwise here (*Byron agt. N. Y. State*

Loonam agt. Brookway.

Printing Telegraph Co., 26 Barb. R. 39). The point was not raised in *Keegan agt. The Western R. R. Co.* (4 Selden Rep., 175). In the former case it was held that "the allegation of negligence would be sustained by proving the danger from the defect in the pole and that it was known to the defendants." There was no such evidence adduced upon this trial; on the contrary it would appear that the defendant did not consider the employment hazardous, as he illustrated the process to the plaintiff, and the latter successfully pursued the occupation without accident or complaint for fifteen days. It was not pretended that the defendant knew or had reason to believe that any defect or imperfection of the apparatus used by the plaintiff existed until after the accident happened. The proper inquiry is, whether, at or before the time the accident occurred, there was any indication of danger such as demanded or suggested precautions which were omitted. As nothing happens without a cause, so perhaps no accident ever occurred as to which suggestions might not afterwards be made by which it might have been prevented. The plaintiff, if he had discovered any imperfection or insufficiency, had not advised the defendant; the latter does not appear to have been present while the plaintiff was engaged at his work, except upon the first day. "There is nothing legally wrong (*says* BRAMHALL, B, in *Dynen agt. Leach*, 26 Law Journ. Exch. 221) in the use of an employer of works or machinery, more or less dangerous to his workmen, or less safe than others that might be adopted. It may be inhuman for an employer to carry on his works so as to expose his workmen to the peril of their lives; but it does not create a right of action for an injury which it may occasion, where the workman has known all the facts and is as well acquainted as the master with the machinery, and voluntarily uses it." In *Williams agt. Clough* (3 Har. & Nor. Rep. 258), the said learned Judge said, "I abide by the opinion I expressed in the case referred to (just

Loonam agt. Brockway.

quoted), that a master cannot be held liable for an accident to his servants while using machinery in his employment, simply because the master knows that such machinery is unsafe, if the servant has the same means of knowledge as the master." It was held in *Assop agt. Yates* (2 *Hur. & Nor. R.* 767), "that the plaintiff could not recover for injuries, because after he had complained of the heating, and knowing all the circumstances, he voluntarily continued at work."

The cases of *Griffiths agt. Gidlow* (3 *Hur. & Nor. R.* 648); *Scrip agt. The Eastern Counties Railway Company*, *post*, in principle, are singularly like the one under consideration. In the first there was evidence that the hook by which the barrel was attached which drew it up was not safe; that it ought to have a spring hook, which it was alleged, would have prevented the misfortune which led to the accident. "The answer to this (*says* *Watson, B.* p. 655) seems to us to be that the plaintiff himself knew the hook and worked with it himself, possibly attached it to the tub or barrel which afterwards fell upon him, and seems never to have made any observations or complaint in respect to it. We think that a servant so acting cannot maintain an action against an employer. He himself was contributory to the injury, and as it was stated by Lord CRANWORTH, in the case in the House of Lords (*Patterson agt. Wallace*, 1 *Macqueen*, 748), it is essential for the plaintiff or pursuer to establish that the injury arose from no rashness of his own."

In *Scrip agt. The Eastern Counties Railway Co.* (23 *Law Jour. Rep.* 23), the plaintiff was a railway guard on defendants' line. His duties were to attach goods' carriages to the engine, and dispatch them to a particular station. He was occasionally assisted by a porter. On the 5th of July, 1852, it was necessary to shift the carriages from one line to another, and within a limited time, in order to prevent a collision with a down passenger train, which would shortly be due. While he was in the performance of this work,

Loenam agt. Brockway.

and for the want, as he said, of an additional person to assist him, the engine started and he was thrown on the rails, and his arm was crushed, and had to be amputated. He had been three months in the service of the company. He sued the company for damages, alleging that it was the duty of the defendants to take all due precautions to prevent unnecessary danger, and that in consequence of their neglecting to assign some one to assist him in the present instance, he had met with the accident. The court of exchequer held that the company was not liable. * * *

If there was danger, and great precaution was necessary, the plaintiff in the present action being the sole operator, might have left the employ of the defendant, or omitted to turn the steam into the barrel, or have turned off the steam when he found the water he had put into the barrel by contact with the steam was, as he testified, "boiling like mad." Again, the accident can be attributed to human fallibility, in that the plaintiff hammered the "plug" down into the barrel so tight that even the alleged extraordinary pressure of steam emitted into the barrel for five minutes, failed to send the plug out, and the barrel gave way. The consequence of his voluntary act under such circumstances, cannot be visited against the defendant, however distressing the calamity which befell him, permanently disabling him from pursuing many of the occupations of life.

We might with great propriety, have rested our disposition of this case upon the reasons assigned by the learned judge upon dismissing the complaint, and the case there cited, *Wright agt. The N. Y. Central Railroad Co.* (25 N. Y. R. 566), but in justice to the learned counsel who so ably argued the exceptions, we have carefully examined all the authorities cited by them, as well as some others to which we have alluded.

The complaint was properly dismissed. The exceptions must be overruled, and judgment be entered for the defendant.

People agt. The Court of Common Pleas.

SUPREME COURT.

THE PEOPLE *ex rel.* NEW YORK CONSOLIDATED STAGE CO.
agt. THE COURT OF COMMON PLEAS FOR THE CITY AND
COUNTY OF NEW YORK.

Writs of prohibition are granted by the superior courts of England, and in this state by the supreme court alone, to prevent inferior courts from exceeding their jurisdiction, or to prevent the usurpation of jurisdiction. But this court cannot issue the writ to deprive an inferior court of a jurisdiction which the law in its wisdom has thought proper to give it.

The court of common pleas for the city and county of New York is intrusted with equity powers as amply as this court, to entertain jurisdiction of an action to set aside as fraudulent, an assignment for the benefit of creditors, and to enjoin the assignee from holding possession of or interfering with the assigned property and effects.

General Term, February, 1865.

Before INGRAHAM, P. J., CLERKE and SUTHERLAND, Justices.

APPEAL from an order revoking a writ of prohibition.

C. A. RAPALLO and WM. F. ALLEN, *for relators, appellants.*

A. R. LAWRENCE, JR., and H. W. ROBINSON, *for respondents.*

By the Court, CLERKE, J. I. The weight of authority is certainly in favor of the proposition, that a refusal to grant a writ of prohibition is not appealable. It seems to have been held by the greater number of judges in England that the awarding of a prohibition is discretionary; that is, in the language of MATTHEW BACON: "from the circumstances of the case the superior courts are at liberty to exercise a legal discretion, but not an arbitrary one, in refusing prohibitions, where in such like cases they have been granted, or where by the laws and statutes of the realm, they ought to be granted." (*Bacon's Abridgement, Title Prohibition B*; see also *ex parte Brandlacht*, 2 Hill, 367.)

People agt. The Court of Common Pleas.

The determination of this question is, however, not necessary in the present case, for the justice, from whose order this appeal is taken, was abundantly justified in refusing to grant a writ of prohibition, or, which is the same thing, in revoking a writ which he had inadvertently issued.

The writ is granted by the superior courts of Westminster, and in this state by the supreme court alone, to prevent inferior courts from exceeding their jurisdiction. It appears to me very plain that the court of common pleas, in entertaining jurisdiction of the action entitled *Hugh Smith and John Kerr agt. The New York consolidated Stage Company and others*, did not exceed its jurisdiction. In doing so, that court does not necessarily exercise the visitatorial power intrusted alone to the supreme court. The main object of the action was to have an alleged fraudulent assignment executed by a majority of the directors declared null and void, and to enjoin the assignee from holding possession of or interfering with the property and effects of the company. This is the exercise of the ordinary equity powers, with which the court of common pleas is as amply intrusted as the supreme court. To grant a writ of prohibition, therefore, in that action, would be an attempt to deprive the common pleas of a jurisdiction which the law, in its wisdom, has thought proper to give it; whereas, this court is only allowed to issue the writ to prevent the usurpation of jurisdiction. If, in the exercise of its lawful authority, or if, having taken rightful cognizance of an action, the common pleas should not only declare the assignment null and void, and enjoin the assignee from taking possession of the property of the company, it should go further and assume additional powers which it does not possess, or committ any other error, the remedy is not for the injured parties to apply to this court for a writ of prohibition, but to have recourse to the appropriate appellate jurisdiction for a correction of such errors. In short, although this court, in the exercise of its

Cadwell agt. Goodenough.

supreme superintending power over all other courts of original jurisdiction in the state, will, unhesitatingly, issue a writ of prohibition, where visitatorial or any other authority is usurped, it will refuse the writ when the general scope or purpose of the action is within the jurisdiction of the inferior court—an overstepping of its authority in a portion of its judgment, or any other error in its proceedings, being a ground of appeal or review, but not of prohibition (*see Grant agt. Gould, 2 H. Black. 100, for various reasons a most interesting case*).

The order should be affirmed, with \$10 costs.

SUTHERLAND, J., concurred.

NEW YORK SUPERIOR COURT.

CADWELL agt. GOODENOUGH, and others.

Assuming the court to have the power to order a *bill of particulars* after the issues in the cause have been referred to a referee to hear and determine, it will not be exercised to interrupt a trial actually proceeding before him.

Special Term, October, 1864.

THIS is an application by the defendants for a bill of particulars of the plaintiff's demand.

MONCRIEF, J. It appears that the action was commenced in July, 1863; that issue was joined in August, 1863; that the action was referred to Hon. W. F. Allen, to hear and determine in November, 1863; that the plaintiff has given testimony on her own behalf upon several occasions, and the further trial of the cause stands over for the cross-examination of said plaintiff by the defendants. The order to show cause why a bill of particulars should not be fur-

Cadwell agt. Goodenough.

nished, and in the meantime staying all proceedings, would not have been granted had these facts been presented to the judge who granted the order. There can be no necessity for a formal written bill of items, when the plaintiff, if she has not already upon the direct, upon her cross-examination can be compelled to disclose the nature of her claim with the nicest particularity.

It was held in *Andrews agt. Cleveland* (3 *Wend.* 43) that when a bill of particulars is applied for by a defendant after issue joined, it is a suspicious circumstance, and the officer granting the order should be well satisfied that the object of the party is not delay; and he should require a good excuse for the late application.

Assuming the court to have the power to order a bill of particulars after the issues have been referred to a referee to hear and determine, I am quite clear that it will not be exercised to interrupt a trial actually proceeding before him.

The motion must be denied, with \$10 costs. The order staying proceedings is vacated.

Siney agt. The New York Consolidated Stage Co.

SUPREME COURT.

SINEY agt. THE NEW YORK CONSOLIDATED STAGE CO. AND
AUGUSTUS SCHELL.

An order of a judge appointing a receiver is not appealable. Neither is the order of a judge substituting one receiver in place of another appealable.

New York General Term, February, 1865.

Before INGRAHAM, P. J., CLERKE and SUTHERLAND, Justices.

APPEAL from an order of a judge substituting and appointing one receiver in place of another.

C. A. RAPFALLO and WM. F. ALLEN, *for defendants and appellants.*

A. R. LAWRENCE JR. and H. W. ROBINSON, *for Smith & Kerr.*

By the court, CLERKE, J. It is not necessary to consider whether Kerr & Smith have a right to be heard on this appeal, both the plaintiff and defendants being alike dissatisfied with the order of the special term, have appealed. They bring the matter to the cognizance of the general term, and if it is appealable at all, the court has entire control of the matter on appeal. But this is not an appealable order. Before the person who was in the first instance appointed receiver entered on his duties, and indeed before the appointment was consummated by the filing of the requisite bond, the judge in the exercise of the same discretion which induced him to make the first nomination, reconsidered his action, revoked that nomination, and substituted another person. It is of no consequence how or where he received any information which induced him to make the substitution. We think he exercised a discretion which cannot be controlled by us.

The appeal should be dismissed.

Bowman agt. Tallman.

NEW YORK SUPERIOR COURT.

GEORGE BOWMAN agt. WILLIAM M. TALLMAN.

Motions to vacate process or proceedings for *irregularity*, issued or taken in a cause, must be made at the first opportunity after the irregularity is discovered, otherwise the irregularity will be deemed to be *waived*.

The mere oral announcement of "*judgment of affirmance*" by the general term, and the entry of such decision in the minutes of the clerk, is not such a judgment of the general term as will authorize action under it. A formal judgment, which embraces the decision, and which becomes a permanent record of the court, must be entered by the clerk, and such judgment only, *removes the stay of proceedings* from the judgment appealed from.*

General Term, November, 1864.

Before ROBERTSON, Ch. J., MONELL and McCUNN, Justices.

On the 22d of February, 1864, judgment was entered in favor of the plaintiff against the defendant. On the same day an appeal was taken by the defendant from the judgment to the general term of this court, and an undertaking to stay proceedings upon the judgment was filed. The appeal was argued in the general term, and on the 28th of May, 1864, the general term orally announced its deci-

*NOTE.—As an original question it would seem to be quite difficult to find a satisfactory reason for continuing a stay of proceedings upon a judgment appealed from, after the general term has announced its decision upon the appeal, of judgment of affirmance. In fact it is not easy to find any principle which will authorize the stay of proceedings after such decision of the general term. The Code (§ 335) provides that (in order to stay proceedings on appeal) "a written undertaking be executed on the part of the appellant, by at least two sureties, to the effect that if the judgment appealed from or any part thereof be *affirmed*, or the appeal be dismissed, the appellant will pay," &c. Now it would seem that the day the general term pronounce "*judgment of affirmance*" in the cause, the *appeal* is at an end; the general term have no further jurisdiction or power over it, and the sureties on the undertaking on that day become (conditionally) liable to the respondent. It may very well be that the judgment must be entered formally by the clerk, before affirmative action can be taken upon *that judgment*, as for instance, in issuing execution upon it for costs, or for the purpose of bringing an appeal to the court of appeals, &c.; but this formal entry and docketing of the judgment are mere ministerial acts to be performed by the clerk, under the requisitions of the Code; but the *judicial decision* to which it is supposed the *stay of proceedings* on the appeal is limited by the statute is an act of the court which can only be announced once and forever, so far as that appeal is concerned.—*EXP.*

Bowman agt. Tallman.

sion affirming the judgment. The entry in the minutes made by the clerk is as follows, after the names of the judges composing the court and the title of the cause: "Judgment affirmed with costs." * * *

On the 30th of May, 1864, the plaintiff issued an execution on the judgment of February 22, 1864. An order affirming the judgment was duly entered on the 31st of May, 1864. On the 8th of June, 1864, the defendant appealed to the court of appeals, giving the proper undertaking to stay proceedings. On the 5th of October, 1864, the defendant gave the plaintiff notice of a motion that the execution be vacated and set aside "as irregular, illegal and void," on the ground that at the time of its issuing the judgment had not been affirmed. The motion was granted at special term, and the plaintiff appealed.

GEORGE BOWMAN, *plaintiff in person.*

E. T. GERRY, *for defendant.*

By the court, MONELL, J. I am inclined to think that when the execution issued the stay upon the judgment was not removed. The effect of giving the undertaking on the appeal to the general term, was to stay all further proceedings upon the judgment appealed from (*Code*, § 339), and an execution could not regularly issue until after the decision of the general term affirming the judgment. The mere oral announcement of a decision by the judges sitting in the general term, and the mere entry of such decision in the minutes of the clerk, is not such a judgment of the general term as will authorize action under it. I think a formal judgment which embraces the decision, and which becomes a permanent record of the court, must be entered by the clerk, and that such judgment only removes the stay of proceedings (*Lentilhon agt. Mayor, &c.* 1 *Code Rep. N. S.* 111). There was, however, a valid judgment to support the execution. Its effect and operation, and the

Bowman agt. Tallman.

rights of the plaintiff to enforce it by appropriate process, was merely suspended pending the appeal, and it was an irregularity in the conduct of the proceedings to enforce it, to issue an execution until after judgment of affirmance had been duly entered. But it was an irregularity merely. Mr. Tidd (1 *Tidd's Pr.* 512) says: "an irregularity in practice may be defined to be the want of adherence to some prescribed rule or mode of proceeding. And it consists in omitting to do something that is necessary for the due and orderly conducting of a suit, or doing it in an unseasonable time, or improper manner;" and he mentions the entering of judgment before the time to plead has expired, the service of an execution after its return day, &c., &c., as instances of irregularities.

The long and uniform practice of the court has required that motions to vacate process or proceedings irregularly issued or taken in a cause, shall be made at the first opportunity after the irregularity has been discovered, otherwise the irregularity will be deemed to be waived. The execution in this case was issued on the 30th of May, 1864, and as the defendant's attorney states in his affidavit, was on the same day levied on the defendant's property. Yet the defendant omitted to take any steps to procure the execution to be set aside until the 5th of October, more than four months after it was issued. I think he was too late, and should be deemed to have waived the irregularity, especially as the judgment of affirmance was entered in due form on the 2d of June, and the defendant appealed therefrom on the 8th of June, with knowledge of the irregular issuing of the execution.

The order appealed from should be reversed.

ROBERTSON, J. The Code terms every direction of a court or judge not included in a judgment "an order" (§ 490), but it would be a matter of little practical consequence whether the determination of a court at general term, upon an appeal from a judgment at special term,

Bowman agt. Tallman.

should be designated as an order or a judgment, were it not that the same section (just cited) requires an order to be entered in writing. Only "the final determination of the rights of the parties in an action," can be a judgment which is required to be entered in the "judgment book" kept by the clerk (§ 279), and to specify clearly the relief granted, or other determination of the action (§ 280). A copy of it is to form part of the "judgment roll," along with the pleadings, verdict, report, exceptions, case and certain other papers affecting it.

In case of a judgment at general term upon a verdict at special term, where directed to be subject to the opinion of the former, and in that case only, it being as reviewable on appeal as if exceptions had been actually taken on the trial (§ 333), questions or conclusions of law, together with a concise statement of the facts upon which they "arise," are required to be filed with such judgment roll (*Id.*). The general term is expressly authorized to render a technical "judgment" only in such a case, and when exceptions taken at a trial are reserved to be heard by it in the first place (§ 265). The Code recognizes the grant or refusal of a new trial by an order (§ 11), and extends the appellate jurisdiction of the court of appeals to such order "as an actual determination by the general term" (*Id.*), although the determination by the court of appeals therein, is termed distinctively a "judgment" (*Id.*). These various provisions of the Code seem to make a decision of a court at general term affirming or reversing a judgment of the same court at special term, according to the nomenclature of such Code, a mere "order." The technical "motion" (§ 401, *sub. 1*) disposed of thereby (*Id.* § 400) being an "application" to vacate the judgment and grant a new trial. The judgments mentioned in sections 19 and 38 of the Code, probably were intended to embrace every kind of decision, since otherwise, less than the number of judges specified in such section might grant or refuse an order for a new trial. In

Bowman agt. Tallman.

this case, therefore, the decision of the general term was a mere order, and should have been entered as such in writing before it could take effect if it had been a judgment and merely orally announced. Such announcement, would unquestionably in such a case, authorize the reduction of the decision to form, and justify a settlement and allowance of its written record subsequently, although all the judges who made it should then not be members of the court. And in such case, such record when made, would relate back to the time of such announcement.

The stay of proceedings in this case was by statute, and not by a special order of the court. In the latter case the defendant's remedy might have been confined to a motion for an attachment for disobedience of such order. In the former it is irregular to proceed, and the proceedings may be set aside as void. The order at general term affirming the judgment at special term related back to the time of pronouncing the decision. The anticipation of it by issuing the execution was a mere irregularity, the levy of such execution on the day it was issued, was notice of its issuing. I fully concur, therefore, in the views of my brother MONELL, in considering the right to move to set it aside waived by five months' delay in making the motion.

The order appealed from should be reversed, without prejudice to a motion by the defendant to stay proceedings on suitable terms.

McCUNN, J. I agree fully with the chief justice and with Justice MONELL, that the order appealed from in this case should be reversed, but I differ with them widely in my reasoning in arriving at this conclusion. I believe the theory or practice laid down by the learned counsel for the plaintiff is the correct practice. The learned justice who heard the case below misapprehended the fact, in assuming that no judgment roll was filed till June 2, 1864, for the judgment roll in the case was undoubtedly filed in February, 1864, and the execution fully refers to this judg-

Bowman agt. Tallman.

ment and its entry, and he was mistaken, therefore, in his reason for granting the motion. He evidently based it on the supposition that a new judgment had been entered up for costs at general term, for he certainly did not refer to the original judgment which was affirmed, because to that judgment, and with that judgment the execution, which defendant is now moving to set aside, fully and completely refers.

The practice is well settled that where a judgment is affirmed, it does not add to or modify the original judgment, it remains as when entered up originally; the rule is simply to enter up a new judgment for the costs, so that in fact there are two judgments in the case—the original judgment, and the judgment for costs. Supposing no costs or disbursements had been allowed to either party on the appeal, certainly no second judgment would have been entered—all that could have been done under such circumstances was to obtain from the clerk at general term a certified copy of the order affirming the judgment, and the filing of that with the clerk of the court in which the judgment was first entered, is all that would be necessary (2 *Tiffany & Smith's Practice*, 153). This was all done by the plaintiff in this action, and this, I hold, was all he was required to do. After the court had determined the case, it must give effect to its determination as of that date, and all orders concerning the same must be as of that date. (*Wilson agt. Henderson*, 15 How. 90; and *Crawford agt. Wilson*, 4 Barb.)

The judgment of affirmance when entered, must refer back to the day and term it was pronounced (*Rochester Bank agt. Emerson*, 10 Paige). In this judgment (the judgment below) the plaintiff cannot take any proceedings on the same founded on the act of the general term. This execution is founded on the original judgment alone, and whatever rights or liens are acquired by a levy under it, must be treated as vested rights (*Berry, receiver*, 26 Barb.

Lester agt. Abbott.

65). It has been held in the case of *Jackson agt. Varrick* (7 Cow. 413), that on a case and bill of exceptions, the prevailing party may take the effect and advantage of the decision the moment it is announced. I am not insensible to the value of the arguments which have been advanced to us by the learned counsel for the defendant. These arguments raise one of the many difficulties I have found in the case. They do not, however, affect my view as to the conclusions we should arrive at.

The order appealed from should be reversed, but I do not concur with the learned chief justice that it should be reversed, with privilege to renew, &c. I agree with Justice MONELL that the order should be reversed unconditionally, and with costs.

NEW YORK SUPERIOR COURT.

ANDREW LESTER and others, HENRY HENNEQUIN and others
agt. ABBOTT, POLLOCK & COCHRAN, assignors, and JOHN
STEWART and CORNELIUS FISKE, assignees.

An assignment for the benefit of creditors, which authorizes the assignees "to pay off all the debts due and owing by the said firm of Cochran & Pollock (the assignors), or the late firm of Abbott, Pollock & Cochran, or either of the members of said firms to Cornelius Fiske" (one of the assignees), is fraudulent and void on its face, as against the creditors of the assignors.

It is not material whether either of the assignors was or was not individually indebted to the assignee Fiske, at the time the assignment was made, for the assignment assumes that they were so indebted, and in effect directs him to be paid, without specifying any sum of indebtedness, and that too, in preference to the creditors of the firm or either of them, if the assignees so elect.

Special Term, February, 1865.

THE plaintiffs respectively recovered judgments against the firm of Abbott, Pollock & Cochran, and after the return of executions unsatisfied, commenced an action against the judgment debtors and their assignees, to set aside an assignment made by the firm of Pollock & Cochran (Abbott

Lester agt. Abbott.

having previously sold out his interest in the firm of which he was a member to the last mentioned firm) to John Stewart and Cornelius Fiske, assignees, for the benefit of creditors. The assignment, among other provisions, contained this clause: "To pay off all the debts due and owing by the said firm of Cochran & Pollock, or the late firm of Abbott, Pollock & Cochran, or either of the members of said firms to Cornelius Fiske."

C. BAINBRIDGE SMITH, *for plaintiffs.*

A. BOARDMAN, *for defendants.*

BARBOUR, J. An assignment for the benefit of creditors, which directs or authorizes such a disposition to be made of the property conveyed, or of its proceeds, as will if so carried into effect by the assignee, operate to deprive the assignors' creditors of their right to have such property applied to the payment of their claims, is proven by itself, and therefore, by evidence which is incontrovertible, to be fraudulent in fact, as against the creditors of the assignor. For the assignor must be held to have intended to do what he has done, and to have designed to defraud his creditors, if the assignment directs or permits it, and the evidence of such intention there found is conclusive, under well established rules of law, and cannot be contradicted by oral testimony. In my view, therefore, it is not material whether either of the three persons mentioned in the third direction, was or was not individually indebted to the assignee Fiske at the time the assignment was made, for that instrument assumes that they were so indebted, and directs him to be paid, and to be paid too, as I understand the effect of the direction, in preference to the creditors of the firm, or either of them, if the assignees should so elect.

But beyond this, the authority given to the assignees to pay Mr. Fiske, was not a direction to pay any specified

Lester agt. Abbott.

sums on account of such individual indebtedness, nor expressly to pay to him such amounts as those persons owed him at the time the assignment was made, as is usual in deeds of assignment, but under the peculiar workings of such third clause of the trust, I see no reason why Mr. Fiske may not pay to himself out of the proceeds of the property as they shall be received, any claims that may then be due and owing to him by either Abbott, Pollock or Cochran, individually. So far as regards the direction to pay the creditors of Pollock & Cochran, individually, the assignment is unobjectionable as concerns the plaintiffs here, for the property belonged to the firm of Pollock & Cochran, and except for their legal obligation to apply the partnership property to the payment of the creditors of that firm, they had a perfect right to prefer their individual creditors other than those to whom they were indebted as members of the former firm of Abbott, Pollock & Cochran, but they were legally bound to apply their property to the payment of their own liabilities, including their indebtedness as members of the former firm, and had no right to appropriate it to the payment of the individual debts of Abbott, who had no interest in such property. For these reasons, I am of opinion that the assignment must be declared invalid as to the plaintiffs here, and that they are entitled substantially to the relief demanded in the complaint. The assignees, however, should be required only to pay the plaintiffs' claim and the costs of this action out of the assigned property or its proceeds, which was in their hands or under their control at the commencement of this action.

The pressure upon my time, because of the great amount of business brought before the court at the February special term, is such as to render it impossible for me to give my views at length upon the question raised by the defendants' counsel at the hearing, as to the effect of the judgment of the common pleas and supreme court, in the action brought

Richmond agt. Sherman.

by receiver Bostwick. I am satisfied, however, that those judgments do not constitute a bar to this action.

SUPREME COURT.

EDWARD RICHMOND agt. PELEG SHERMAN, and others.

Another decision that no more than *five term fees* for noticing and putting a cause on the calendar of the court of appeals, can be allowed and taxed.

Third District General Term, March, 1862.

Before HOGBOOM, PECKHAM and MILLER, Justices.

ON filing the remmittitur in this cause from the court of appeals in the supreme court, the clerk of Rensselaer county taxed the plaintiff's costs and allowed more than five term fees in the court of appeals. The defendants appealed from the clerk's taxation to the special term, where Mr. Justice G. G. BARNARD reversed the taxation, and held that five term fees only were properly taxable.

IRVING BROWNE, *for plaintiff,*

thereupon appealed from the decision of the special term to the general term.

JEFFREYAH ROMEYN, *for defendants.*

The COURT held that no more than five terms in the court of appeals were taxable, and affirmed the decision at special term.

Johnson agt. Casey.

NEW YORK SUPERIOR COURT.

JOHN H. JOHNSON agt. PATRICK CASEY.

An *injunction* dissolved on the grounds: 1. That the affidavit and papers upon which it was granted were *illegible*; 2. That the injunction had not been served on the *defendant personally*; 3. That the papers had not been filed as required by the rule of court.

Special Term, March, 1865.

MONELL, J. The papers handed me on this motion are so illegibly written, that I am unable fully to read them. Especially the affidavit upon which the injunction was granted, so obliterated, interlined and defaced, as to render it unfit to go upon the files of the court. As far as I can understand anything from the papers, it appears that the only person on whom the injunction has been served is John T. Stewart, the attorney authorized by the defendant to foreclose the mortgage. Neither the injunction nor any paper in the suit has been served on the defendant. The defendant, therefore, is not under any restraint, and Stewart not being a party is not affected by the injunction. The injunction was granted on the 11th of February, and it appears that none of the papers in the suit have been filed as required by the rules of the court (*rule 4*). That is a sufficient reason for dissolving the injunction. The plaintiff's proceedings have been irregular throughout. First, in presenting papers so illegible as to be incapable of being read. Second, in not serving the injunction and affidavit on the defendant; and third, in not filing the papers. If the last two reasons were not conclusive, I should be inclined to hold the first sufficient.

Motion granted, with \$10 costs.

McGovern agt. The Western Railroad Company.

SUPREME COURT.

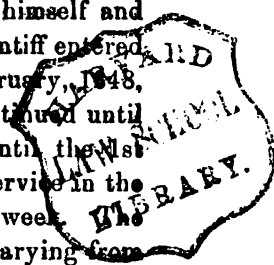
PATRICK MCGOVERN, appellant agt. THE WESTERN RAILROAD COMPANY, respondent.

An action for work, labor and services, done and performed by the plaintiff for the defendants under an agreement made with a *sub-agent* of the defendants, whose acts in such cases to be valid, are subject to the approval of a *general agent* of the defendants cannot be maintained, where notice has been given to the plaintiff by the general agent of the disapproval of such contract.

Albany General Term, December, 1864.

Before PECKHAM, MILLER and INGALLS, Justices.

THIS is an appeal from a judgment entered upon the report of a referee in favor of the defendants. The action was brought by the plaintiff to recover compensation for extra services rendered by the plaintiff for the defendants, in the capacity of night watch, Sunday nights, at the defendants' depot at Chatham Four Corners, from January 8th, 1854, to April 1st, 1858, at one dollar per night, which the plaintiff claims was agreed upon between himself and one Lee, the agent of the defendants. The plaintiff entered the defendants' employment on the 24th February, 1848, as a night watch during *week days*, and so continued until the 8th January, 1854, from which period until the 1st April, 1858, he continued in the defendants' service in the capacity of night watch every night during the week. The plaintiff received from the defendants wages varying from \$20 to \$34 per month, and signed the pay rolls from time to time, as the payments were made, until the close of his service. Lee, the person with whom the plaintiff claims to have made the agreement, died in February, 1854, about a month after the making thereof. The plaintiff testifies that he informed Mr. Day, who succeeded Lee, of the agreement, and that Day stated to him that he would represent the matter to Mr. Gray, the general superintendent,



McGovern agt. The Western Railroad Company.

and subsequently informed him (plaintiff) that he had done so, and that Gray gave him no satisfaction in regard to the matter. The plaintiff further testified, that after Day left he was succeeded by one Knight, to whom he explained the matter, and Knight promised to confer with Mr. Gray in relation to the matter, and that Knight subsequently informed him that Gray gave him no satisfactory answer. The plaintiff continued in the defendants' employment till April 1, 1858, receiving his pay and signing the rolls.

Day was examined as a witness for the defendants, who testified in substance, that the plaintiff informed him of his claim for extra compensation, and that he spoke to Mr. Gray in relation thereto, who informed him that the plaintiff was receiving his pay all the while, and if he was not satisfied with his compensation he might quit the employment; that he communicated to plaintiff Mr. Gray's answer.

Gray was also examined as a witness, and testified in substance that Lee had no authority to employ the plaintiff to render the service except by his (Gray's) approval, which was never given; that plaintiff spoke to him several times in reference to extra compensation for the Sunday night watching, and that he replied to plaintiff that nothing would be paid.

Benjamin F. Knight was also examined as a witness, and stated that he succeeded Day in the agency, continuing from April, 1856, to April, 1859; that in less than a month after his agency commenced, plaintiff spoke to him in reference to the agreement with Lee for extra pay, and desired him to call Mr. Gray's attention to it; that he did speak to Gray, who replied that it was an old story which he supposed had been settled long ago; that Day and others had spoken to him about it before, and that he acknowledged no such contract, and had not authorized any agent to make any such arrangements, and if plaintiff was not satisfied with his wages he was at liberty to leave.

McGovern agt. The Western Railroad Company.

Knight further states that he informed plaintiff of what Gray said, and plaintiff replied, it was pretty hard.

P. W. BISHOP, *for plaintiff and appellant.*

1. Plaintiff may recover notwithstanding his signing the pay rolls. They are simply *receipts*, and open to explanation (1 *Phil. Ev.* 94).

2. The defendants were bound by the contract made by plaintiff with Lee, their agent. He was acting within the scope of his authority. It was almost an every day occurrence for him to discharge and hire men for defendants. And from these known and public acts exercised by him for a number of years, plaintiff had a right to infer a proper authority.

3. Besides, if Lee had not proper authority to contract with plaintiff, it appears that plaintiff performed this work under the special directions of Henry Gray, defendants' superintendent, whose authority is unquestioned.

4. According to the limited agency which defendants contend Lee was clothed with, he had a right to initiate a contract, and that of course would be good until disapproved of by defendants.

5. If plaintiff was not entitled to recover for the full term claimed by him, he was at least entitled to recover for services down to the time when he was informed that if he was not satisfied with the wages he was getting that he could leave.

6. But if the contract with Lee was a valid one, he is entitled to recover all he claims.

7. Plaintiff was never discharged by defendants from the performance of the Sunday night watching, and the Sunday night watching was beneficial to defendants, and performed by contract with Lee, and by directions of the superintendent, to save their wood from being stolen.

8. The plaintiff for years before had been required to

McGovern agt. The Western Railroad Company.

watch week day nights, and received *monthly* wages. Could the superintendent direct his agent to have plaintiff watch Sunday nights also without compensation? I think not. But if he could do so he did not; he says no such thing to Lee when he directs him to put plaintiff on Sunday nights, and besides Lee agrees to pay for such services.

9. It is claimed by defendants that plaintiff was a seven-day man, as it is termed in railroad parlance, yet Gray swears that it appears from the pay rolls upon which plaintiff's name appears, that the men are month-men or day-men. Besides, defendants would not permit plaintiff to show that he did not receive the usual wages of seven-day men. The printed pay roll shows he at least was a month-man.

10. The wages of the month-men and day-men were fluctuating constantly, and the pay rolls upon which plaintiff's name appears show that. Not so with seven-day men. This fact shows that plaintiff was not a seven-day man, and never received pay as such. Besides, during all that time he was trying to get his extra pay, and down as late as March, 1858, he applied to Gray for it, and Gray said he would see about it.

II. The referee erred in striking out the evidence of Hurlbut in reference to Lee's hiring the plaintiff. The admissions testified to were made while acting within the scope of his authority (1 *Phil. Ev.* 99 to 102, 105-6).

2. The referee erred in rejecting the evidence of Clarke, to show that he took the place of plaintiff as watchman at \$30 a month, and that there was no increase in the wages of the other men employed then by defendants. This evidence was material to show plaintiff was a month-man, and not a seven-day man as now claimed by defendants.

3. The referee erred in receiving the evidence of Gray as to Lee's authority. The question was clearly wrong in form, being leading.

4. The referee erred in excluding the evidence offered

McGovern agt. The Western Railroad Company.

by plaintiff to show that he did not receive the usual wages of men who watched every night. This was material in establishing the fact that plaintiff only received his usual monthly wages, and that he was not paid as a seven-day man.

III. The third statement of facts found by the referee, is not sustained by the evidence in the case. The contract for Sunday night work with the agent was established. The superintendent directed it to be done. Plaintiff always claimed pay for it, and was never paid anything.

2. The fifth statement of facts found by the referee is not sustained by the evidence. The agent had authority to hire. He exercised it every day, and the hiring was good and binding on defendants until disapproved of, and the man notified or discharged. Can an agent set an employee at work about the business of his principal, and that too by the directions of the principal, and have the principal escape liability upon the ground of want of original authority, in the agent to do the act?

3. All the exceptions to said report are well taken, and judgment should be reversed and new trial granted.

J. C. NEWKIRK, for defendants and respondents.

I. The plaintiff has been paid in full for the time he worked.

1. He was paid every month in full for the services of each month, and gave receipts to that effect each month.

2. There is no evidence that the plaintiff did not know the nature of the receipts he signed.

3. There is no evidence of mistake or fraud in the giving of the receipts, or that they do not express just what was the understanding of the parties.

4. The plaintiff was hired by the month, and was paid each month for a month's work; he could work no more than a month in each month.

McGovern agt. The Western Railroad Company.

II. The receipts are conclusive between the parties unless there is mistake or fraud shown, of which there is no proof in the case.

III. The agent Lee, had no authority to agree to pay the plaintiff extra for watching Sunday nights, so as to bind the defendants. The plaintiff seeking to recover on the employment of an agent, must show the authority of the agent to bind the principal. The referee has found that the agent did not have such authority in this case, which finding is sustained by the evidence.

IV. The plaintiff receiving his pay for the month of January, 1854, and for each subsequent month, without an increase of pay, and signing receipts in full for services, contradicts the alleged fact of an agreement to pay him more or extra for the Sunday nights. The plaintiff gives no explanation why he signed those receipts.

V. The plaintiff soon after the alleged agreement, was informed that he would not be paid extra for watching Sunday nights; that Mr. Lee had no authority to make such an agreement; that the watching Sunday nights was a duty he was bound to perform as a part of his month's work, and came within his employment for a month's work, and that if he was not satisfied with the pay he was getting he might leave, and he continued to work and receive his pay after this as before.

1. The receiving his pay monthly after that without an increase of pay, and signing receipts in full payment for each month's services, was an abandonment of his alleged claim for extra pay.

2. Having received such pay and given such receipts, he cannot now recover on an alleged agreement for increased pay.

3. For such payments were made by the defendants, receipts taken, and the employment of plaintiff continued, with notice to plaintiff that the defendants repudiated the alleged agreement for extra pay, and that the payments

McGovern agt. The Western Railroad Company.

made from month to month were in full for all claims. This was continued for the period of over four years. The defendants had a right to infer that the claim for extra pay had been abandoned.

4. After all this, and after the lapse of such a length of time, to permit the plaintiff to recover would be a fraud upon the defendants, and the plaintiff is now estopped from alleging such claim.

VI. The evidence of the declarations and admissions of S. P. Lee, were properly stricken out and rejected.

1. They were not made at the time of the making the agreement as a part of the transaction.

2. The defendants were not bound by any admissions made afterwards by their agent. (*Thallimer agt. Brinckerhoff*, 4 *Wend.* 394; *Fogg agt. Child*, 13 *Barb.* 246; *Budlong agt. Nostrand*, 24 *Barb.* 25.) The judgment should be affirmed with costs.

By the court, INGALLS, J. The referee has found among other facts, in substance, that the plaintiff during all the time he worked for the defendants was hired by the month, at from \$20 to \$24 per month, and received the pay and signed the pay rolls; that Gray was the general superintendent during all the time the plaintiff was in the defendants' employment; that the authority of Day, Lee, and Knight to employ workmen was subject to Gray's approval, and that Gray never authorized them to pay the plaintiff any greater sum than he was receiving as his month's wages; that the plaintiff was informed soon after he commenced watching Sunday nights that his compensation would not be increased, and that he might leave the defendants' employment if dissatisfied, and that he continued watching Sunday nights after he was so informed; that the employment of the plaintiff to watch Sunday nights, and to pay him an extra compensation therefor, was without the consent or approbation of the general superintendent

McGovern agt. The Western Railroad Company.

of the defendants, and not binding upon them, and that the plaintiff was not entitled to recover for such extra work; that the plaintiff continuing to work after he was informed that his pay or wages would not be increased by reason of such extra work, and receiving his pay every month to the time he left the employment of the defendants, *is evidence that he did not expect* any more or greater pay than he was receiving.

If the referee has found the facts correctly, and where there is a conflict in the evidence this court must assume that he has, I think this cause was properly decided. If Lee was not authorized to employ the plaintiff to render the extra service, and bind the defendants to pay therefor, the plaintiff could have no legal claim against the defendants unless they adopted and ratified the act of Lee, thereby creating a liability. Whether Lee possessed that authority, or whether the defendants ratified such employment, were questions of fact, upon which the referee has found adversely to the plaintiff, and the evidence is not such as to justify this court in interfering with the determination of the referee upon those questions. The evidence shows that soon after the plaintiff's employment commenced he applied for pay for such extra service, and was informed that it was unauthorized, and would not be acceded to by the defendants, and if persisted in by the plaintiff, he was at liberty to leave the defendants' employment, after which the plaintiff continued rendering the same service, and receiving and receipting his monthly wages, without any recognition by defendants of this claim for extra compensation. Under such circumstances, I think the plaintiff must be held to have waived such claim, and is thereby concluded by such waiver. When he was informed by the superintendent that if the claim for extra pay was insisted upon by the plaintiff, he would not be continued in the defendants' service, the plaintiff was put to an election, either to abandon the employment or continue upon the

McGovern agt. The Western Railroad Company.

terms proposed by defendants, and having continued, and accepting the monthly wages and receipting the same, the referee was justified in holding him concluded by his own conduct in regard to such extra compensation.

While an ordinary receipt for money is the subject of explanation, and may not conclude a party, yet the explanation should be such as to leave no reasonable doubt that it was not intended to embrace the claim sought to be recovered. In this case the evidence is far from producing that effect—goes far to support the receipt, and renders it conclusive. The referee committed no error in striking out the evidence of Hurlburt in reference to Lee's hiring the plaintiff, as it was a declaration to a third party, not made to or in the presence of the plaintiff, nor was his name mentioned, nor did the declaration accompany any *authorized act*, to explain or characterise which such declaration was necessary.

The referee properly excluded the evidence of Clarke that he took the place of the plaintiff at the compensation of \$30 per month, and that there was no increase in the wages of other laborers. This evidence was wholly immaterial so far as the plaintiff was concerned, as the company were at liberty to employ whoever they chose, and to pay whatever sum they were disposed to, and the evidence if admitted, could not have properly affected the liability of the defendants to the plaintiff. The objection was not well taken to the question put to the witness Gray, as to Lee's authority to employ plaintiff. The objection was too general—being aimed at form and not substance—the plaintiff should have specified the defect, so that the defendants could have changed the form of the question. (12 *N. Y.* 451; 5 *Barb.* 406; 17 *Wend.* 143.) If the plaintiff intended by the objection that the question was leading, that was matter of discretion with the referee.

The referee properly overruled the offer of the plaintiff to prove that he was not paid the usual wages of men who

Mechanics' and Traders' Bank of Jersey City agt. Dakin.

watched every night in the week. The same reasons may be assigned in support of this decision of the referee as that in excluding the evidence of Clarke. It is quite possible that the plaintiff has not received an adequate compensation for his services; however that may be, this court cannot re-try the cause, its province being merely to review the proceedings of the referee, to ascertain whether any error has been committed by him upon the trial; if none are discovered the judgment must be affirmed.

Having arrived at the conclusion that no error was committed by the referee, the judgment must be affirmed with costs.

SUPREME COURT.

THE MECHANICS' AND TRADERS' BANK OF JERSEY CITY agt.
HENRY DAKIN, DITMARS JEWELL AND FITE MILLER.

The lien acquired by the levy of an attachment under the Code, even on chattels alleged to have been fraudulently assigned, will not alone authorize an action to set aside the assignment as fraudulent, either before or after judgment in the attachment suit.

An assignment of a bond and mortgage by a non-resident debtor, alleged to be fraudulent, does not authorize the judgment creditor to bring an action to set aside the assignment as a fraudulent obstruction, and to remove it out of the way of his execution, for the plaintiff could not reach or sell the bond and mortgage or the mortgage debt, by or under his execution, if the assignment were declared fraudulent and void, nor could he even if the assignment had not been made by the debtor.

New York Special Term, March, 1865.

THE complaint in this action alleges that defendant Dakin, July 21, 1862, was indebted to plaintiffs upon his note dated March 1, 1862, in the sum of \$3,740.82 and interest; that plaintiffs commenced an action in this court against Dakin on said note, July 23, 1862, and in that action an attachment against Dakin's property was issued, he being a non-resident; that the attachment was directed to

Mechanics' and Traders' Bank of Jersey City agt. Dakin.

the sheriff of Tompkins county, who August 1, 1862, executed the attachment by levying upon an indebtedness due by the defendant Fite Miller, to said Dakin, arising on the bond of said Miller given to said Dakin for the sum of \$4,000, which indebtedness amounted to the sum of \$3,750, with interest from July 1, 1862, the payment of which was secured by a mortgage on certain real estate situate in the county of Tompkins, made and executed by said Miller to said defendant Dakin, bearing date April 14, 1857, and duly recorded in Tompkins county clerk's office on the 16th day of April, 1857; that said sheriff on said 1st of August, duly served on said defendant Miller, a certified copy of said warrant of attachment, together with a notice showing the property attached and levied upon, and particularly describing said indebtedness and said bond and mortgage, and received a certificate from said Miller, signed by him, in which he certified that he was indebted to said Dakin in the said sum of \$3,750 and interest, and that the same was secured by said mortgage; that said sheriff duly made and returned an inventory of the property so attached, and appraised the same, and proceeded in all matters under said attachment in the manner required of him by law; that plaintiffs in that action obtained judgment against Dakin for \$4,416.19, April 7, 1863, and filed a transcript thereof in Tompkins county, and the judgment was docketed there on the 8th April, 1863; that execution on said judgment against the property of Dakin was issued to the sheriff of Tompkins county April 8, 1863, which execution is still in the hands of said sheriff and never has been returned; that Dakin has no property real or personal, out of which said judgment or any part of it can be satisfied except said bond and mortgage, and the indebtedness secured to be paid thereby; that the plaintiff acquired a lien upon said bond and mortgage and the indebtedness secured to be paid thereby, by virtue of said attachment and execution, and they are prevented enforcing it by reason of the

Mechanics' and Traders' Bank of Jersey City agt. Dakin.

fraudulent assignment thereof to the defendant Jewell; that on or about the 26th March, 1862, and after the making and delivery of the promissory note aforesaid by said Dakin, he, the said defendant Dakin, made or pretended to make an assignment of said bond and mortgage to the defendant Ditmars Jewell, which assignment was recorded in Tompkins county clerk's office April 4, 1862. And the plaintiffs charge that said assignment was fraudulent, and was made by said Dakin with intent to hinder, defraud and delay his creditors, and especially the plaintiffs, in the collection of their said demand, and that the same was made to prevent the plaintiffs from collecting the amount due them on said promissory note. That said defendant Jewell is a brother-in-law of said Dakin; that as plaintiffs are informed and believe, the said Jewell did not pay any consideration or value for said assignment, but the same was made wholly without consideration; that said Dakin still continues, in effect, the owner of said bond and mortgage, and the interest that has been paid thereon since said pretended assignment has been paid to said Dakin, and received by him to his own use; that a copy of said attachment was soon after the commencement of the action aforesaid, served upon the said defendant Jewell.

The complaint then demands judgment as follows: That the assignment of the bond and mortgage be adjudged to be fraudulent and void as against the plaintiffs; that the title to the bond and mortgage be adjudged to be in Dakin; that the bond and mortgage be adjudged to be subject to the lien of the attachment and execution; that the sheriff be authorised to collect this bond and mortgage from Fite Miller, and employ the proceeds to the satisfaction of the plaintiffs' judgment and execution; that the parties may be enjoined, &c., *pen dente lite*.

The answer of the defendant Fite Miller, admits the execution of the bond and mortgage, and that there is due thereon \$3,750, and interest from July 1, 1863; admits

Mechanics' and Traders' Bank of Jersey City agt. Dakin.

that on July 21, 1862, the sheriff of Tompkins county served on him the attachment, and attached the bond and mortgage; denies knowledge, &c., as to the regularity of the plaintiffs proceedings under the attachment; avers that interest is paid to July 1, 1863; avers that plaintiffs and Jewell both claim the bond and mortgage adversely to each other, and that he, the defendant, is ready to pay the right owner, and cannot determine who that is, whether the plaintiffs or Jewell; denies each and every allegation not expressly admitted. The answer of the defendant Dakin denies knowledge, &c., as to plaintiffs being a corporation; denies knowledge, &c., as to whether attachment was issued; admits service of attachment on Miller, but denies knowledge as to whether Miller gave a certificate, and says if it was given it was not true; denies that sheriff attached any indebtedness of Miller to him; denies that Miller was indebted to him when attachment was served; avers that on August 1, 1862, and for four months anterior thereto, and ever since, defendant Jewell was the legal holder and owner of the indebtedness and bond and mortgage, and solely entitled to demand and receive said indebtedness; denies knowledge, &c., of inventory, appraisement, proceedings under attachment, judgment, transcript, docketing and execution; admits that he had no property in the state of New York, wherewith to satisfy plaintiffs' judgment in whole or in part; denies he has any interest in the bond and mortgage; avers that the judgment is founded on the note to Bramhall, dated March 1, 1861; that as collateral for the note Bramhall holds a mortgage on an undivided one-third of real estate in Vermont, purchased chiefly by defendant of Bramhall; denies that the plaintiffs have any right to have satisfaction of their judgment out of the bond and mortgage; denies that the assignment to Jewell was or is fraudulent; admits that on March 26, 1862, he assigned the bond and mortgage to Jewell; avers that he assigned, sold and delivered the bond and mortgage in good

Mechanics' and Traders' Bank of Jersey City agt. Dakin.

faith, and Jewell purchased them in good faith for \$3,500, then and shortly subsequent, paid by said Jewell to defendant in cash, and that such assignment was valid; asks leave to refer to assignment and bond and mortgage in the possession of Jewell since the assignment; denies that the assignment was fraudulent; denies that the assignment was made and delivered, or received with any fraudulent intent, or with any such intent or design as is averred by the plaintiffs; avers that he received full consideration for the assignment, and that he has not been the owner of the bond and mortgage since the assignment, and has had no interest in it; denies that any interest since the assignment has been paid to him as his own, or received as his own, or for his use; avers that any such interest by him received since the assignment, was received by him as the agent, and for the use of Jewell, on the receipt thereof; denies all fraud and fraudulent purpose, design or practice, averred or charged in plaintiffs' complaint. Answer of defendant Jewell, denies knowledge, &c., of plaintiffs being a corporation, and of Dakin's indebtedness; denies knowledge, &c., as to attachment and the proceedings under it; admits that sheriff served attachment on Miller as alleged, but denies knowledge, &c., as to whether Miller gave certificate, and says if it was given it was not true; denies that sheriff attached any indebtedness of Miller to Dakin; denies that Miller was indebted to Dakin when the attachment was served; avers that on August 1, 1862, and for four months anterior thereto, and ever since, he was the exclusive legal holder and owner of said indebtedness; denies knowledge, &c., of inventory, appraisement, proceedings under the attachment, judgment, transcript, docketing, execution, and whether it can be satisfied; denies knowledge, &c., as to whether Dakin has property in this state, and avers that plaintiffs have no right to have the execution satisfied out of the bond and mortgage; denies that the plaintiffs have acquired any lien on the bond and mortgage by the attach-

Mechanics' and Traders' Bank of Jersey City agt. Dakin.

ment; denies that the assignment is fraudulent; avers that Dakin, March 26, 1862, duly assigned said bond and mortgage, and it was recorded, &c.; avers that Dakin assigned, sold and delivered the bond and mortgage in good faith, for \$3,500, then and shortly thereafter paid by defendant to Dakin in cash; such assignment being in writing in due form of law, acknowledged and recorded; asks leave to refer to assignment, and bond and mortgage, which since March 26, 1862, was in his, Jewell's, personal custody and possession; denies that the assignment was fraudulent; denies that the assignment was given or received with any fraudulent intent, or with any intent or design avowed by the plaintiffs; avers that he paid a full consideration for the assignment, and that Dakin has not been the owner of the bond and mortgage since the assignment, and has had no interest in it; denies that any interest since the assignment has been paid to Dakin as his own, or been received by Dakin as his own, or for his own use; avers that any such interest received by Dakin since the assignment was received by him as the agent, and for the use of him, Jewell, and that he paid such interest to him, Jewell, on the receipt thereof; admits the service of the attachment on him as alleged, and says he gave the sheriff a certificate that on March 26, 1862, he purchased the bond and mortgage of Dakin, and paid him for it in full, and then held it in his possession; denies all fraud, fraudulent intent and practice, wherewith he is charged.

Dakin was a resident of the state of Vermont, as admitted by the answers, and sworn to by the witnesses on the trial.

On the trial, the plaintiffs claimed that the only disputed question of fact in the case was as to whether the assignment of the bond and mortgage by Dakin to Jewell, dated March 26, 1862, was fraudulent and void as against the plaintiffs, who were creditors of Dakin. That from the testimony of Edmund C. Bramhall, a witness sworn on the

Mechanics' and Traders' Bank of Jersey City agt. Dakin.

trial, could be gathered the connection and situation of Bramhall and Dakin, and the manner in which the note upon which the judgment was recovered, originated. Bramhall advanced money to carry on an enterprise in Vermont, which was expended by Dakin, and, as would appear, in which enterprise both Bramhall and Dakin had an interest. This money was obtained from the plaintiffs by loans to Bramhall. March 27, 1861, Bramhall and Dakin had a settlement, and on that settlement it was ascertained that Dakin owed Bramhall the amount of the note, and Dakin gave the note on which judgment was recovered to Bramhall for the balance thus found due by him on the settlement, and Bramhall indorsed the note to the plaintiffs for the money they had loaned to him, and which had thus been expended by Dakin in his enterprise. The enterprise in which Dakin was thus engaged was not successful. This was evident by the whole of the testimony of Bramhall—he said the money expended was money thrown away. Dakin had given Bramhall to understand while he, Bramhall, was making advances, that the said bond and mortgage of Fite Miller should be given to him as security for such advances. When the enterprise became unsuccessful, Dakin sought to evade the promise to Bramhall to secure him for his advances by means of the Miller bond and mortgage, and when in October, 1861, Bramhall sought to obtain from him the performance of his promises, and thus obtain the bond and mortgage, Dakin refused to give it to him, and stated that he would put the bond and mortgage beyond his, Bramhall's reach. Bramhall testified, that when in Vermont, Dakin had promised him that this bond and mortgage should be applied to this debt, and that afterwards, to wit: in October, 1861, when he again saw Dakin in Vermont, and reminded him of this promise, Dakin then refused to carry out the promise, and threatened to put the bond and mortgage beyond the reach of any one holding this claim.

Mechanics' and Traders' Bank of Jersey City agt. Dakin.

WILLIAM WILKINSON, *attorney*, and WILLIAM HENRY ARNOUX, *counsel for defendant*,

moved to dismiss the complaint on the merits. 1st. On the ground that the plaintiffs have shown no fraudulent transfer of the bond and mortgage, and no want of consideration. 2d. As matter of law, for want of jurisdiction in the court to grant the judgment in the action against the non-resident defendant Dakin, the summons never having been served on him personally, and there was no appearance (*Code*, § 135, *sub. 4*). The bond and mortgage being personal property and movable, is governed by the law of the domicile of the owner. (*Story's Con. L.* §§ 376 and 379; *Sill agt. Worewick*, 1 *H. Black.* 690; *Hoffman agt. Carow*, 22 *Wend.* 285, and cases cited under note at end of § 380, *Story's Con. L.*; *Mackeldey's Civil Law*, 269, § 259; 1 *Edw. Ch.* 645; *Kilbourn agt. Woodworth*, 5 *John. R.* 37; *Robinson agt. Ward's Executors*, 8 *Id.* 86; *Pawling agt. Bird, Executor*, 13 *Id.* 192.) Plaintiffs standing as simple contract creditors, cannot attack an alleged fraudulent assignment. (*Reubens agt. Joel*, 13 *N. Y. R.* 488; *Cropsey agt. McKinney*, 30 *Barb.* 47.) 3d. Because execution has not been returned *nulla bona*. (*Crippen agt. Hudson*, 13 *N. Y. R.* 161; *McElwain agt. Willis*, 9 *Wend.* 548; *affirming S. C.* 3 *Paige*, 505; 4 *John. Ch.* 671; *Knauth agt. Bassett*, 34 *Barb.* 31; *Andrews agt. Durant*, 18 *N. Y. R.* 500; *Willard's Eq. Ju.* 238; *Beck agt. Burdett*, 1 *Paige*, 309.) 4th. Because the plaintiffs have not exhausted their legal remedy. (*Wilson agt. Forsyth*, 24 *Barb.* 105; *Code*, § 237.)

MARSH, COE & WALLIS, *attorneys*, and LUTHER R. MARSH, *counsel for plaintiffs*,

to sustain the action under the attachment, cited *Code*, §§ 227, 232, 235, 237. That the levy under the execution relates back to the levy under the attachment. (*Skinner*

Mechanics' and Traders' Bank of Jersey City agt. Dakin.

agt. *Stewart*, 13 *Abb.* 442; *Burkhardt* agt. *Sanford*, 7 *How. Pr. Rep.* 259.) This action is not what is commonly known as a judgment creditor's suit, but an action to remove an obstruction that prevents the attachment and execution at law, and it is the province of a court of equity to come in in aid of legal remedies where fraudulent obstructions are placed in the way of their enforcement. In such an action it is not necessary to aver the return of an execution. The creditor having an attachment does not stand in the position of the creditor at large, but a creditor with a special lien, which is to be enforced by the execution. (*Hendricks* agt. *Robinson*, 2 *John. Ch. R.* 283; *affirmed in the Court of Errors*, 17 *John. R.* 438; *McElwain* agt. *Willis*, 9 *Wend.* 548; *Skinner* agt. *Stewart*, 15 *Abb.* 391; *Crippen* agt. *Hudson*, 3 *Kern.* 161; *Fassett* agt. *Tallmadge*, *Supreme Court, first district general term, manuscript opinion, June, 1864; Code*, §§ 235 and 237; *Falconer* agt. *Freeman*, 4 *Sand. Ch. R.* 565; *Rinckey* agt. *Stryker*, 26 *How. Pr. R.* 75, *Court of Appeals*.) As to the insufficiency of the answers in denying that the assignment of the bond and mortgage was fraudulent or made with a fraudulent intent. (*Litchfield* agt. *Pelton*, 6 *Barb.* 187; *Dykers* agt. *Woodward*, 7 *How. Pr. R.* 313; *Churchill* agt. *Bennett*, 8 *Id.* 309.)

SUTHERLAND, J. My findings of fact, &c., show the ground upon which I dismiss the complaint, irrespective of the question of fraud, or of other questions in the case. The plaintiffs' counsel appears to concede in his points that the action cannot be maintained as a judgment creditor's bill or action, technically, but he insists that the action can be maintained as an action to remove a fraudulent obstruction out of the way of the plaintiffs' execution. But if Dakin had never assigned the bond and mortgage, or if his assignment were declared fraudulent and void, the plaintiffs could not reach or sell the bond and mortgage, or the mortgage debt, by or under the execution. How then

Bensen agt. Suarez.

could or can Dakin's assignment of the bond and mortgage be an obstruction in the way of the execution? (See *Beck* agt. *Burdett*, 1 *Paige*, 305; *McElwain* agt. *Willis*, 3 *Id.* 505.)

As the assignment by Dakin to Jewell of the bond and mortgage, was good between the parties to it, however fraudulent it may have been as to the creditors of Dakin, I doubt whether the sheriff could attach the same, or the debt secured thereby, whether the sheriff's proceeding under the attachment was not nugatory; but if otherwise, it has been frequently held by this court that the lien acquired by the levy of an attachment under the Code, even on *chattels* alleged to have been fraudulently assigned, would not *alone* authorize an action to set aside the assignment as fraudulent, either before or after judgment in the attachment action. (*Wilson* agt. *Forsyth*, 24 *Burb.* 105; *Brooks* agt. *Stone*, 11 *Abbott*, 220; *Mills* agt. *Block*, 30 *Barb.* 552.) Indeed this follows from the decision in *Reubens* agt. *Joel* (13 *N. Y. R.* 488). There is nothing in the decision, or in either of the opinions in *Fassett* agt. *Tallmadge*, referred to by plaintiffs' counsel, which favors the plaintiffs' right to maintain this action.

The complaint must be dismissed as to all the defendants, with costs.

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SUPREME COURT.

NATHAN L. BENSEN agt. LEONARD S. SUAREZ.

Where an *unsafe, dilapidated building* falls and injures the property of another adjoining, the *owner* of such building is liable for such injury, although the building and premises upon which it stood were *leased to a tenant*, reserving rent. Especially is the owner liable where he covenants in the lease to keep the premises in repair.

A *tenant* is in *lawful possession* of premises where he has the actual consent of the lessee and the landlord, although there is a clause in the lease that the lessee shall not under-let without the consent of the *lessor in writing*.

Benson agt. Suarez.

Albany General Term, May, 1864.

Before PECKHAM, MILLER and INGALLS, Justices.

THIS is a motion for a new trial on a bill of exceptions. The cause was tried at the Albany circuit, November, 1863, before Justice HOGEBOOM and a jury, where the plaintiff recovered a verdict for \$500. The defendant asks for a new trial.

HENRY SMITH, *for the motion.*

IRA SHAFER, *opposed.*

By the court, PECKHAM, J. The defendant insists that the judge erred in refusing to non-suit the plaintiff. I do not think so. The defendant was the owner of the tavern stand and appurtenances where the old shed fell. He had leased them to Finney, and covenanted to keep them in repair. He failed to keep this old shed on his premises in repair, and by reason of its being left in a weak and dilapidated condition it fell down, and drew down a shed adjoining to it of the plaintiff, and injured his wagons, &c., to the amount of the verdict. I am not at all clear that it was necessary to show any covenant to repair by the defendant, in order to sustain this action. "*Sic utere tuo ut alienum non lædas*," is a sound maxim, and entirely applicable to this case. An owner has no right to erect a nuisance on his own land to the injury of his neighbors. He cannot erect so weak and unsafe a building that it shall fall in ordinary times from its mere insecurity and insufficient strength, and thus injure the building or property on his adjoining neighbor, without being responsible for that injury, nor can he suffer a building on his premises to become so much out of repair as to cause a like injury without being responsible, especially when he had notice of its condition and neglected to repair. Nor can he shield himself from liability in such case by charging negligence

Bensen agt. Suares.

on his neighbor for presuming to occupy his own lot in a careful manner in the face of such a danger.

What is this but saying to his neighbor, "I have erected an unsafe and dangerous building on my lot, and you must allow yours to lie vacant and unoccupied, otherwise my building may blow down upon you and destroy your property." (See *Cook agt. The Ch. Trans. Co.* 1 *Denio*, 91; and see *La Sala agt. Holbrook*, 4 *Paige*, 173; *Panton agt. Holland*, 17 *J. R.* 92.)

Leasing premises to another, reserving rent, with such an unsafe building thereon, I do not think discharges the liability of the owner. Whether it does or not, however, is not material here, as the defendant in this case agreed to keep the building in repair. It is objected that it was only for hotel purposes that he agreed to keep in repair. That contract fully covers this case. They were not in sufficient repair for hotel purposes when they could not stand up in ordinary weather. I see no error in the charge of the judge. The plaintiff could, no doubt, be in the lawful possession of the premises leased to Finney without any covenant in writing from the defendant, the owner. He was in the actual occupation thereof. He had the consent of Finney, the lessee of the defendant, to be in. He had the actual consent of the defendant to be in also, but he had no written consent. As to whom then was he a wrong-doer? It is of not the slightest consequence that the lease provided that the lessee should not under-let without the consent in writing of the lessor. This was not an action upon the lease, and this plaintiff was no party to the lease. Surely by the consent of all the parties interested he could get into the lawful possession and occupation of the premises. He had all that as the jury have found, and as the evidence proved. Nor do I think the judge committed any error in refusing to charge as requested, and I think the remarks already made, if correct, show that he could not be required so to charge.

Schuchardt agt. Remiers.

A new trial is denied, and judgment ordered upon the verdict.

NEW YORK COMMON PLEAS.

FREDERICK SCHUCHARDT and FREDERICK C. GEBHARD, respondents agt. THEODORE REMIERS, appellant.

Under section 121 of the Code, the *representatives* of a deceased *sole defendant*, in an action after judgment and pending an appeal thereon, have the right to have themselves made parties to the appeal.

General Term, February, 1865.

Before DALY, BRADY and CARDOZO, Judges.

APPEAL from an order denying the motion of the deceased defendant's representatives to be made parties to the appeal in this action.

PLATT, GERARD & BUCKLEY, *attorneys, and*

THOMAS C. T. BUCKLEY, *counsel for plaintiffs.*

VAN PELT & HALL, *attorneys and counsel for defendant.*

By the court, DALY, J. In *Keene agt. Lafarge* (1 *Bosw.* 671), the defendant died after issue was joined, and before judgment, and Chief Justice BOSWORTH held that in that case an application by the representatives of the deceased defendant to have the suit continued, could not be entertained. He was of the opinion that section 121 of the Code was designed to confer upon the representative of a deceased sole plaintiff only the right to continue the action or to abandon it, and not to enable the representative of a deceased sole defendant to compel the plaintiff to continue the action against his will, and he formed the opinion upon the absence of any provision in the Revised Statutes broad enough to cover such a case, and upon the construction that section 121 authorizes the representatives

Schuchardt agt. Remiers.

of a deceased party only to make such a motion within a year as may be allowed after a year upon a supplemental complaint. It may be that the construction was a correct one in the case which was presented to Chief Justice Bosworth, but it will not apply in the case which is now before us. In the present case the defendant died after he had obtained a judgment against the plaintiffs for costs, and after they had appealed from the judgment. If no appeal had been taken, his personal representatives could have compelled the payment of the judgment by bringing an action upon it, which in that case would have been the appropriate, if not the only remedy. (*Cameron agt. McKay*, 6 How. R. 373; *Thurston agt. King*, 1 Abb. R. 126.) But if at the time of the defendant's death the ordinary undertaking upon appeal was given to stay all proceedings upon the judgment until the hearing of the appeal, his representatives could not bring such an action, the proceedings upon the judgment being stayed.

It does not appear in this case whether such an undertaking was given or not, nor is it material, since it has been settled since the time of *Coke* that the proceedings for a review of the judgment upon error, do not abate by the death of the defendant, or any one of the defendants in error, but his death being suggested upon the roll, the writ of error proceeds. If he died before the assignment of error, his executors might have a *scire facias quare executionem non*, to compel the plaintiff to assign error, or if he died after, they might proceed as if the defendant were living until the judgment was affirmed. (*Jacques agt. Cesar*, 2 Sand. R. 101; *Bromley agt. Littleton*, Yelv. R. 113; *Wickett agt. Crafter*, 1 Salk. R. 264; 1 *Ld. Ray. R.* 439; *Fowler agt. Bridges*, 1 Show. R. 183; *Bowes agt. Poulett*, *Sir F. Moore's R.* 701; *Wright agt. Freevoke*, *Barnes' Notes*, 432.) And such was the practice both before and after the passage of the Revised Statutes. (2 *Dunlap's Practice*, 1144; *Graham's Practice*, 965, 2d ed.) The parties upon

Schuchardt agt. Remiers.

an appeal from a judgment occupy the same relative position that was occupied before the Code by the parties upon a writ of error. The defendant in this case was the defendant in the judgment and the defendant upon the appeal, holding the same position as the defendant in error under the former practice.

The Code has abolished the writ of *scire facias*, and has substituted in its place the more summary and less expensive proceeding for continuing an action provided for in section 121, and in other cases where the writ of *scire facias* was the only mode in which the personal representative of a deceased party could compel the payment of a judgment obtained by him in his lifetime, they have given a remedy by a civil action (§ 428.) The writ of *scire facias* would lie wherever there was a new person to be benefited or charged by the execution of the judgment, to make him a party to it (*Penoyer agt. Bunce*, 1 *Ld. Ray. R.* 246; 1 *Salk.* 319, 20 *S. C.*; *Johnson*, 17 *Johns. R.* 271; 1 *Tidd's Practice*, 114, 1188, 9th *Lond. ed.*), and that writ being now abolished, and the personal representatives of the deceased defendant, having an interest in the judgment which was recovered by him, and an interest in the appeal that was pending at the time of his death, they have the right to have themselves made parties to the appeal, that they may obtain an affirmance of the judgment; and the proper mode of doing it by analogy to the former practice, is by a motion to the court in the manner provided for by section 121.

The order denying them that right should, therefore, be reversed.

Livingston agt. Painter.

SUPREME COURT.

ROBERT J. LIVINGSTON agt. JANE A. PAINTER, Administratrix, &c., of WM. R. PAINTER, and THOMAS E. BOYES, respondents.

An agreement entered into between the first and second mortgagees of the same premises, that the first mortgagee should waive his option to claim the whole principal sum due on his mortgage, on default of payment of interest, in consideration that the second mortgagee would—*First*. Pay the interest in arrear. *Second*. Prosecute the foreclosure of the second mortgage to the earliest possible conclusion; and, *Third*. In the event of the second mortgagee buying in his own name or otherwise, at the foreclosure sale, the mortgaged premises, he should reduce the principal sum secured by the first mortgage, by paying on account of the same the sum of \$3,000, is an agreement which entitles the party showing a violation of it by the other, to a decree in a court of equity for a specific performance. (*This decision reverses S. C. at special term, 24 How. Pr. E. 231.*)

New York General Term, February, 1865.

Before INGRAHAM, P. J., CLERKE and SUTHERLAND, Justices.

THIS was an appeal from a judgment of the special term dismissing the plaintiffs' complaint, on the ground that it did not present a case for the equitable interposition of the court. The opinion below is reported in 24 *How. Pr. R.*, 231.

The action was brought to compel the specific performance of an agreement entered into between Alexander Hamilton, Jr., executor, &c., the assignor of the plaintiff, and William R. Painter, the defendant's intestate. The agreement recited that Painter was the owner of a second mortgage on the leasehold premises No. 84 Leonard street, for \$12,340, which he was then foreclosing; that Hamilton as executor, was the owner of a first mortgage for \$12,000 on the same premises, the principal of which had at the option of said Hamilton become due in consequence of a default in the payment of interest; that Hamilton had agreed to waive this option, and in consideration thereof Painter agreed,—*First*. To pay the interest in arrear. *Second*. To

Livingston agt. Painter.

prosecute the foreclosure of the second mortgage to the earliest possible conclusion; and, Third. In the event of said Painter buying in his own name or otherwise, at the foreclosure sale the said leasehold, he should reduce the principal sum secured by the first mortgage, by paying on account of the same the sum of \$3,000.

The complaint after setting up the agreement, alleged that Painter obtained a judgment of foreclosure of the second mortgage, under which the leasehold was sold at auction, and bought in the name of the defendant Boyes, who received the sheriff's deed; that Painter bought the lease in the name of Boyes for the purpose of evading the above agreement; that Boyes paid no consideration for the leasehold, and that he acted as a mere cover, agent or trustee for Painter; that Painter failed to reduce the first mortgage by paying \$3,000 on account thereof, and that the bond, mortgage and agreement had been assigned to the plaintiff.

The complaint demanded, First. That the sheriff's deed to Boyes be declared fraudulent and void so far as it prevented the specific performance of the agreement. Second. That Painter reduce the first mortgage by paying on account of the same the sum of \$3,000; and, Third. For general relief.

On the trial of the action at the November special term, 1862, the court dismissed the complaint upon the pleadings and the plaintiff's opening. From that judgment the plaintiff appealed to the general term.

LEWIS L. DELAFIELD, *for appellant.*

I. It is submitted with great respect, that the learned court erred in dismissing the complaint in this action. It should have heard the evidence, and have granted the plaintiff "any relief consistent with the case made by the complaint, and embraced within the issue," irrespective of the prayer of the complaint, and whether that relief was

Livingston agt. Painter.

legal or equitable. (*Code*, § 275; *Marquat* agt. *Marquat*, 12 *N. Y. R.* 341; *Emery* agt. *Pease*, 20 *N. Y. R.* 63; *The N. Y. Ice Co.* agt. *North Western Ins. Co.* 23 *N. Y. R.* 359; *Barlow* agt. *Scott*, 24 *N. Y. R.* 45; *Phillips* agt. *Gorham*, 17 *N. Y. R.* 270; *Crary* agt. *Goodman*, 12 *N. Y. R.* 266; *Dobson* agt. *Pearce*, 12 *N. Y. R.* 165.)

(a) When the defendant has answered, "the demand of relief in the complaint becomes immaterial. The case made by the complaint and the limits of the issue alone determine the extent of the power of the court." By *JOHNSON, J.*, in *Marquat* agt. *Marquat*, *supra*.

(b) The prayer for relief being immaterial, the court must grant whatever remedy the plaintiff shows himself entitled to, whether he has demanded it or not. In *Marquat* agt. *Marquat*, *supra*, the demand was for equitable relief only (specific performance); the cause was tried at the special term, and the court awarded legal relief only (damages). In *Emery* agt. *Pease*, *supra*, the demand was for legal relief only (money due on contract), and the court ordered equitable relief only (an accounting), holding that "if the case which the plaintiff states entitles him to any remedy, either legal or equitable, his complaint is not to be dismissed because he has prayed for a judgment to which he is not entitled" (20 *N. Y. R.* 64).

(c) In this action the complaint demands, 1st, equitable relief, and 2d, such further or other relief as shall be agreeable to equity.

II. The defendants waived a trial by jury by not demanding it when the case came on for trial. (*Barlow* agt. *Scott*, 24 *N. Y. R.* 46; *Greason* agt. *Keteltas*, 17 *N. Y. R.* 491, 498.)

III. If the defendants had demanded and were entitled to a trial by jury, the complaint should not have been dismissed, but the court should have transferred the action to the circuit. (*Code*, §§ 69, 275, and above cases; *Stevenson* agt. *Burton*, 15 *Abb. Pr. R.* 355.)

Livingston agt. Painter.

IV. The defendants object that the plaintiff shows no ground for equitable relief, and that he has a perfect remedy at law. The answer to that is, that the defendants have omitted to raise this objection in their answers, and that it comes too late at the hearing. (*Truscott agt. King*, 2 *Seld. R.* 165; *Le Roy agt. Platt*, 4 *Paige's R.* 77; *Wiswall agt. Hall*, 3 *Id.* 314; *Grandin agt. Le Roy*, 2 *Paige's Ch. R.* 509.)

V. The court below erred in its conclusion of law, "that the complaint in this action does not present a case for the equitable interposition of the court. Judgment must thereupon be entered dismissing the complaint." The plaintiff was entitled to a decree for specific performance. (*Phillips agt. Berger*, 2 *Barb. R.* 608; 8 *Id.* 527; *Ball agt. Coggs*, 1 *Brown Cas. in Par.* 140; *Colt agt. Nettervill*, *P. Wms. R.* 304; *Adderley agt. Dixon*, 1 *Sim. & Stu. R.* 607; *Buxton agt. Lister*, 3 *Atk. R.* 383.)

(a) It is said in the older decisions, that the general rule is not to entertain jurisdiction in equity for the specific performance of contracts relating to personalty.

(b) Judge STORY places the rule on a more philosophical ground, and "limits it to cases where a compensation in damages furnishes a complete and satisfactory remedy" (2 *Story's Eq. Jur.* §§ 718, 724, n. 2).

VI. Such is the law in this state, and it is now settled that the rule that the specific performance of a contract relating to chattels will not be decreed, is limited to cases where a compensation in damages would furnish a complete and satisfactory remedy. (*Phillips agt. Berger*, 2 *Barb. R.* 608; *Phillips agt. Berger*, 8 *Id.* 527; 2 *Parsons' Con.* 511, 529; 2 *Story's Eq. Jur.* §§ 716, 718, *et seq.*; 1 *Sugden on Vendors*, p. 273, and n. 1.) The fact that the relief contemplates the payment of money, is immaterial. The learned judge erred in this respect. (*Phillips agt. Berger*, *supra*; *Crary agt. Smith*, 2 *Coms. R.* 60.)

VII. Equity also enforces contracts in relation to per-

Livingston agt. Painter.

sonalty, when the effect of the breach of the contract cannot be known or estimated with any exactness, either because the effect will show itself after a long time, or for any other reason. (*Ball* agt. *Coggs*, *supra*; *Buxton* agt. *Lister*, *supra*; *Adderley* agt. *Dixon*, *supra*; 2 *Parsons' Con.* 532.)

VIII. The action is brought to compel Painter to perform an agreement by which he undertook in a certain event "to reduce the principal sum secured by the said first mortgage, by paying on account of the same the sum of \$3,000."

(a) The agreement was "to reduce" the mortgage. The mode of accomplishing this is immaterial, and should not influence the court.

(b) The agreement is not to pay money, it is to do a particular thing, to wit: to reduce a mortgage.

(c) The difference is apparent from the results that follow. If the agreement is for the payment of money only, and Lawrence, the mortgagor, pays off the mortgage before Painter pays the \$3,000, this would be no defence to him for not paying that amount. Otherwise, if the agreement is to reduce the mortgage.

(d) This was plainly not the intention of the parties. Painter agreed to reduce the mortgage, because he expected to buy the mortgaged premises. Mr. Hamilton could not, as executor, demand a price for his indulgence,—but it was his duty to increase his security by reducing the mortgage.

(e) The agreement was in effect a contract for additional security and further assurance, which can always be enforced in equity (*Lewis* agt. *Wilson*, 1 *Edw. R.* 305).

IX. The intention of the parties can only be effected by the specific performance of the contract; no other relief would furnish a complete remedy.

(a) It would be impossible for a jury to estimate with

Livingston agt. Painter.

any exactness the damages sustained, because it may not be known for a long time, and it would be said :

1. That it did not follow that Lawrence would not pay off the mortgage.

2. That it did not follow that if the property were sold under foreclosure, it would not bring enough to pay the mortgage debt. This difficulty alone brings the case within the rule stated at point VII.

(b) Whatever damages a jury might award, would be by way of penalty for a breach of the contract, and would not be applied to reduce the mortgage. This would be injurious,—

1. To Lawrence, the mortgagor.

2. To Painter, who bought the property subject to the mortgage.

3. To Mr. Hamilton, who would have an uncertain verdict, instead of the amount agreed upon.

X. The plaintiff, therefore, insists that the learned judge erred in holding "that the damages caused by the delay, are capable of being measured and ascertained by a jury," and that "the plaintiff's redress is by an action for damages."

XI. And that he erred in holding that "if the plaintiff has sustained any injury, it is in consequence of the delay in not prosecuting a foreclosure of the first mortgage."

(a) If the plaintiff had foreclosed, he would have been guilty of as gross a breach of faith as is the defendant.

(b) He could not have foreclosed, because Painter paid the interest in arrear.

XII. If Mr. Hamilton had attempted to foreclose the \$12,000 mortgage contrary to the terms of this agreement, the defendant Painter could have obtained a perpetual injunction against him. This being admitted, it necessarily follows that Mr. Hamilton and his assignees have a reciprocal remedy in equity to compel the specific performance

Livingston agt. Painter.

of the same agreement. (*Phillips agt. Berger*, 8 Barb. R. 528; 2 *Id.* 611; 2 *Story's Eq. Jur.* § 723.)

XIII. The remedy in equity must be mutual. Where a bill will lie in favor of one party, it will lie in favor of the other. The controlling inquiry is, would an action at law afford to the defendant a complete remedy if the plaintiff refused to carry out his agreement? If it would not, and the defendant would be allowed to resort to equity, the plaintiff may do the same. (*Phillips agt. Berger*, 2 Barb. R. 611; *Withy agt. Cottle*, 1 Sim. & Stu. R. 174; *Adderly agt. Dixon*, *Id.* 612; *Cathcart agt. Robinson*, 5 *Peters' R.* 264.)

(a) It is only upon the ground of reciprocal remedy that suits in courts of equity by the vendor against the vendee, to compel the specific performance of contracts to purchase, can be maintained. (*Crary agt. Smith*, 2 Coms. R. 60; *Brown agt. Hoff*, 5 *Paige R.* 240; *Lewis agt. Lechmere*, 10 *Mod. R.* 506; *Cathcart agt. Robinson*, 5 *Peters' R.* 278.)

(b) It is not because there is a distinction between realty and personalty, nor because there is more stability in the one than the other. (*Adderley agt. Dixon*, 1 Sim. & Stu. R. 174; 2 *Story's Eq. Jur.* § 717.)

XIV. Courts of equity have no discretion to refuse equitable relief where they have jurisdiction, unless fraud or circumstances amounting to fraud appear. Except in such cases, it is as much of course to decree a specific performance as it is to award damages at law. (*Hall agt. Warren*, 9 *Vesey's R.* 608; *Seymour agt. Delancey*, 3 *Cow. R.* 505; *Willard's Eq. Jur.* 262; *Bowen et al. agt. The Irish Presby. Cong.* 6 *Bos. R.* 268.)

XV. The discretion which is reserved is not arbitrary and capricious, but must be guided by law and governed by rule. It is retained for the sole purpose of preventing contracts in which fraud appears, from being enforced through the medium of courts of equity. (1 *Sugden on Vendors*, 274; *Seymour agt. Delancy*, 3 *Cow. R.* 451, 505,

Livingston agt. Painter.

521, 525; *Rex* agt. *Wilkes*, 4 *Burrows*, 2539; *Viele* agt. *Troy & Boston R.R. Co.* 21 *Barb. R.* 394; *Davis* agt. *Symonds*, 1 *Cox's Ch. R.* 407; *St. John* agt. *Benedict*, 6 *John. Ch. R.* 117; *Jenkins* agt. *Hogg*, 2 *Cons. R.* 841; *Clement* agt. *Reid*, 9 *Smedes & Marsh. R.* 535.)

XVI. In this action the motion to dismiss the complaint was made upon the pleadings, and before any evidence was introduced. There is nothing in the agreement between Mr. Hamilton and Painter that is harsh or unreasonable, much less fraudulent. It is, therefore, submitted with great respect that the learned judge erred in supposing that he had any discretion to refuse the relief prayed for, and that he erred in dismissing the complaint in the exercise of this supposed discretion.

XVII. This action is peculiarly of an equitable nature. It is brought to have the sheriff's deed to Boyes declared fraudulent and void (3 *R. S.* 15, §§ 51, 52).

XVIII. The judgment should be reversed and a new trial ordered, with costs to the appellant.

R. M. HARRINGTON, *for respondents.*

By the court, SUTHERLAND, J. The agreement of Painter, the holder of the second mortgage, if he bought "in his own name or otherwise," at the sale under the foreclosure of his mortgage, that then he should and would reduce the principal sum secured by the first mortgage (held by Hamilton as executor, &c.), by paying on account of the same \$3,000, was a lawful and valid agreement, for a sufficient and lawful consideration; the consideration being the agreement of Hamilton to waive his option of considering the whole principal of his mortgage due and payable for non-payment of interest; and Painter avers in his answer that Hamilton in fact waived his option to consider the whole principal due, by actually, soon after the making of the agreement, receiving from him the interest. It is easy

Livingston agt. Painter.

to say that the waiver of Hamilton of his right to foreclose his mortgage for the whole principal and interest, might be, and probably was, very beneficial to the holder of the second mortgage. The complaint alleges in substance, that on the sale under the foreclosure of Painter's mortgage, the defendant Boyes purchased the mortgaged premises or interests, and took the sheriff's deed in his name, at the instance and for the benefit of Painter, and with full knowledge of the agreement between Hamilton and Painter, for the purpose of enabling Painter to evade the agreement; and that Boyes paid no money, but gave a mortgage to Painter for the whole amount of the purchase money.

The specific relief asked by the complaint is: 1st. That the sheriff's deed to Boyes be declared fraudulent, inoperative and void, so far as it prevents the specific performance of the agreement by Painter to reduce the principal of the first mortgage by paying the \$3,000 on account thereof. 2d. That the defendant Painter be adjudged to reduce the principal of the mortgage by paying the \$3,000 on account thereof. The complaint also asks for general relief.

It is plain, I think, that the complaint shows a *prima facie* right in the plaintiff (Hamilton's assignee), to come into a court of equity at least for the purpose of obtaining the relief first specifically asked for, and if so, it is perfectly clear that a court of equity having jurisdiction for such purpose, could proceed and give the relief secondly specifically asked for, though the plaintiff might have obtained such last mentioned relief in a court of law. But I do not see how the plaintiff could have obtained this relief in a court of law. The relief is, that Painter be decreed to reduce the principal of the mortgage according to his agreement by paying \$3,000 on account of the principal. Certainly a court of law could not grant this relief. The plaintiff asks for a specific performance of his agreement, and I think the pleadings show *prima facie*, that he has a right to it. I do not see how the plaintiff could

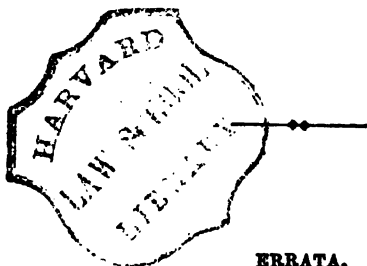
Livingston agt. Painter.

recover anything beyond nominal damages at law, without showing that his mortgage had been foreclosed for the whole principal, and that the mortgaged premises or interests did not bring sufficient to pay the mortgage.

It appears to me that the plaintiff's complaint was inadvertently dismissed, as it was on his opening and the pleadings, and that the judgment should be reversed and a new trial ordered, with costs to abide the event of the action.

INGRAHAM, J. Even if the prayer in the complaint was merely for a sum of money, the facts set out therein show a good cause of action in equity, on which the plaintiff was entitled to relief. If so, and the court had jurisdiction, it could give such relief as the party was entitled to, including a judgment for money if proper.

I concur in reversing the judgment.



ERRATA.

In the case of *Cotes agt. Carroll*, *ante*, p. 436, in the head note, 8th line and second word, for "the" read "an." On page 437, line 23d, for "defendants" read "plaintiffs," and on page 442, for "Id." read "How."



DIGEST

OF THE

POINTS OF PRACTICE

AND

OTHER IMPORTANT QUESTIONS,

CONTAINED IN THE FOLLOWING REPORTS :

28 *Howard's Pr. R.*, and 27 *New York Reports*.

ABATEMENT.

1. The death of a party in an action, cannot change the rights of the other parties; it merely changes the title of the action, and a revival in favor of the representatives is permitted for the purpose of protecting the interests of the estate of the deceased (*Carpentier* agt. *Willett*, ante, 376).
2. Where the defendant died in February, and the action was revived in March following, the *term fees* in the court of appeals for the March and June terms were properly taxable, as one notice for the year in that court is sufficient (*Id.*).

See REVIVOR.

ACCOUNT.

See REFERENCE, 2, 3, 4.

See JOINT STOCK COMPANIES, 4, 5.

See EXECUTORS AND ADMINISTRATORS, 1, 2.

See USURY, 1, 2, 3.

ACTION IN BAR.

1. The record of a court of general jurisdiction, showing a decision that the plaintiff be nonsuited and the action discontinued, establishes no bar to a subsequent suit for the same cause of action (*Audubon* agt. *Excelsior Insurance Co.* 27 *N. Y. R.* 216).

2. The decision in the first action having originally been that the complaint be dismissed, was amended upon summary application by the plaintiff, so as to provide for a nonsuit and discontinuance. The propriety or legality of such amendment is not reviewable upon an appeal taken in the second action, and the amended judgment is the only evidence receivable of the disposition of the former action (*Id.*).

ADMIRALTY.

1. It is a well settled principle of law, that where a *vessel is sailed on shares* (not chartered), all the owners are responsible for her *bills*, especially where the items of those bills show they were for port charges (*Bassett* agt. *Crowell*, ante, 241).
2. Where the claimants file exceptions to a libel, the libellant has a right under the 24th admiralty rule of the supreme court to move to *amend his libel* in any of the points excepted to, without submitting to the exception, as provided for in rule 94 of this court (*Town* agt. *Steamship Western Metropolis*, ante, 283).
3. Where the offending vessel in a case of *collision* is arrested in this district, this court has *jurisdiction* of the cause of action, even though the collision occurred on the Potomac river, *out of the district* (*Id.*).

Digest.

4. Cases of maritime torts committed upon navigable waters, are cognizable in the admiralty within any district where the vessel may be apprehended (*Id.*).
5. Where the claimant excepted to eight distinct matters of form in the libel, it was held that the points of exception embraced matters which are sufficiently explicit and certain to a common intent; or are appropriately subjects of proof, and need not be set out in the pleadings (*Id.*).

AFFIDAVITS.

1. Where a defendant in moving to discharge an order of arrest, predicates his motion on the plaintiff's affidavits, and to which he presents a response, he waives his right to object that the plaintiff's affidavits are entitled in the cause (*City Bank* agt. *Lumley*, ante, 397).
2. The laws of 1863 (p. 449), confers generally the authority to administer oaths and affirmations to be read in evidence and used in any of the courts of this state, without prescribing any particular form of authentication. And it was not the intention of the legislature to impose upon Vice Consuls duties in respect to this subject not imposed upon others (*Id.*).
3. Therefore, where a jurat to an affidavit is in the usual form, and states that the deposition was subscribed and sworn to in the presence of the Vice Consul of Canada, and he so certifies under his seal of office, it is sufficient (*Id.*).
4. Affidavits to procure an order of arrest stating the material facts upon information and belief are sufficient, where they state the sources from which the information is derived, and the places of residence of the informants at such distance that it would be impracticable to procure their sworn statements in season to make a successful arrest. Especially where they contain positive and truthful statements enough to make out a *prima facie* case for arrest (*Id.*).

See INJUNCTION, 2.

AFFINITY.

1. A judge related by affinity to one of the defendants in an action, within the degrees of affinity which would exclude him as a juror, cannot grant an

injunction therein (*N. Y. & New Haven Railroad Co.* agt. *Schuyler*, ante, 187).

2. Such affinity exists where such judge and defendant have married cousins who are still living, and the parties are united by a subsisting marriage (*Id.*).
3. An injunction granted in an equity cause by a judge disqualified by reason of affinity to one of the defendants to sit in the cause, will be dissolved on the application of any of the defendants as to the defendant applying, though the interests and claims of the defendants are separate and distinct, but embraced in one action (*Id.*).

AGREEMENT.

1. Where an agreement is entered into between a creditor and his debtors for staying the entry of judgment against the latter, on certain conditions and payments being performed, and during the performance of the agreement by the debtors, the creditor without any previous notice to the debtors enters up judgment, issues execution and levies upon the debtors' property, the judgment and execution will be set aside with costs, and the judgment cancelled, even if the agreement was unlawful and could not be enforced by legal process (*Jay* agt. *De Groot*, ante, 107).
2. Where it is averred in a complaint that the plaintiff owned the property in question, and loaned it to the defendant, and that it had been demanded of him and he had refused to deliver it, and converted it to his own use, these allegations are sufficient to constitute the action one of *loft*, notwithstanding the agreement under which the defendant received possession of the property is stated in the complaint (*Person* agt. *Cirer*, ante, 139).
3. Where the defendant received property from the plaintiff under an agreement to return it at a certain time or pay to plaintiff a certain sum for its value, and subsequent to the time limited for its return the defendant paid to plaintiff a part of the stipulated value and gave his due bills for the balance, and on the defendant's refusal to return the property on demand of the plaintiff subsequently made:
4. Held, in an action by the plaintiff for the conversion of the property, that the defendant could not be arrested

Digest.

and held to bail. The plaintiff by receiving a part payment and the due bills for the property, had waived his right to insist upon its return by the condition of the agreement, and treated the transaction as a *sale*, and the amount due as a *debt* (*Id.*).

5. An agreement entered into between the first and second mortgagees of the same premises, that the first mortgagee should waive his option to claim the whole principal sum due on his mortgage, on default of payment of interest, in consideration that the second mortgagee would—*First*. Pay the interest in arrear. *Second*. Prosecute the foreclosure of the second mortgage to the earliest possible conclusion; and, *Third*. In the event of the second mortgagee buying in his own name or otherwise, at the foreclosure sale, the mortgaged premises, he should reduce the principal sum secured by the first mortgage, by paying on account of the same the sum of \$3,000, is an agreement which entitles the party showing a violation of it by the other, to a decree in a court of equity for a *specific performance*. (*This decision reverses S. C. at special term, 24 How. Pr. R. 231.*) (*Liv- ington agt. Painter, ante, 517.*)

See CONTRACT.

See PRINCIPAL AND AGENT, 1.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 11, 12, 13.

AMENDMENT.

1. Upon a motion by a subsequent judgment creditor to set aside judgments confessed by his debtor under § 383 of the Code, the court may allow an amendment supporting the judgment by the signing and verifying a new statement stating the facts more specifically (*Mitchell agt. Van Buren, 27 N. Y. R. 300.*).

See ACTION IN BAR, 1, 2.

ALIMONY.

1. To entitle the plaintiff to *alimony and counsel fee*, in an action for divorce for cruel and inhuman treatment, she must make it appear that she has been injured, and present a meritorious cause of action (*Solomon agt. Solomon, ante, 218.*).
2. A single instance of cruelty is not sufficient cause to authorise the court to interfere, although vague charges of

cruel treatment are also made against the husband. The parties to a marriage contract should bear long and patiently with each other; they should exercise the most forgiving spirit, and seek by all possible means to reconcile their differences, before resorting either to the protection or the process of the law to redress their wrongs. They should become fully satisfied that there was no longer any possibility that the duties of their married life can be discharged (*Id.*).

ANSWER.

1. The Code has not changed the rule which requires *certainly and particularity* in stating the offence charged against a plaintiff in a plea of *justification*, in an action of *slander or libel*. The plea or answer must state specifically the offence of which the plaintiff is alleged to have been guilty, giving time, place and circumstances (*Billings agt. Waller, ante, 97.*).
2. In an action of *divorce* for adultery, the defendant, on showing the court a reasonable prospect of establishing the defence, may have leave to *amend or file a supplemental answer*, by setting up the defence of *adultery* against the plaintiff, having discovered the fact after the issues in the cause were first joined (*Strong agt. Strong, ante, 432.*).

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 11, 12, 13.

APPEAL.

1. The court has the power to direct an entry to be made by the clerk on the docket of the judgment "secured by appeal" upon such terms as it may deem fit, and by requiring that an *additional surety* be given, is clearly within the provision of section 282 of the Code (*Bergen agt. Stewart, ante, 6.*).
2. Where, on the trial, a fair question is presented to the court and jury or a referee, upon conflicting evidence, whether the defendant is indebted in the amount claimed by the plaintiff, or as admitted by himself in a certain sum less than the plaintiff's claim, and the court and jury or referee find the indebtedness to be the amount claimed by the plaintiff; the conclusion upon that question of fact is not the subject of review in this court (*Kerr agt. McGuire, ante, 27.*).

Digest.

3. In this case, this court on appeal from a judgment of the county court containing a case and exceptions, in an action originating in a justice's court, *held*, that it could not set aside the verdict and grant a new trial on the ground that the verdict was against evidence—the motion for a new trial on that ground should first be made in the county court, before appealing to this court (*Whitney* agt. *Wells*, ante, 150).
4. But this court *reversed* the judgment of the county court, and granted a new trial in that court for an error in the charge of the county judge (*Id.*).
5. This court on appeal will reverse the decision of a circuit judge setting aside a verdict upon his minutes, on the sole ground that it is against evidence, where they think it is not so decidedly against the weight of evidence as to authorize the judge to set it aside, although if the verdict had been for the other side this court would not have disturbed it upon the evidence (*Overing* agt. *Russell*, ante, 151).
6. A motion may be made at special term to modify a judgment, after final judgment has been entered (*Butler* agt. *Niles*, ante, 181).
7. The order modifying such a judgment is not appealable to the general term (*Id.*).
8. A notice of appeal from a judgment of a justice of the peace, under section 371 of the Code, which states that "the judgment is for too much," is not a compliance with the provisions of this section so as to allow costs to the appellant on his recovery of a more favorable judgment in the appellate court (*Barnard* agt. *Pierce*, ante, 232).
9. If the respondent should offer to allow the judgment to be corrected in this particular, and the appellant should accept the offer, the justice could not make any correction of the judgment. (*The cases of Fox* agt. *Nellis*, 25 How. Pr. R. 144; *Wynkoop* agt. *Holbert*, *Id.* 158; and *Foreyth* agt. *Ferguson*, 27 *Id.* 67, considered.) (*Id.*)
10. Where every exception in the case bears on matters not relating to the sole issue submitted to the jury, and evidence is rejected not bearing on such issue, although competent for other purposes, the exception to it will not lie (*Murphy* agt. *Boker*, ante, 251).
11. In an action brought by executors for the construction of the will of the testator, where several heirs and devisees claiming under the will are made defendants, and a decree or judgment of the court is pronounced allowing the claims of some of the defendants as against the others, the latter defendants on bringing an appeal from the judgment in order to effect their appeal, must not only serve their notice of appeal and other papers upon the plaintiffs, but also upon the defendants who have established their claims under the will, as these defendants are the "adverse party," within the meaning of the Code (§ 327). (*Cotes* agt. *Carroll*, ante, 436.)
12. Where such adverse defendants are not served with notice of appeal, &c., to effectuate the appeal as to them, but their attorney is served with copies of the case and notice of argument, on bringing the appeal to a hearing, the attorney thus served, may on motion, have the cause stricken from the calendar as respects the defendants he appears for, with costs (*Id.*).
13. The court has no power to allow an appeal to be taken after the time limited in the Code for bringing an appeal. Nor has it any power to extend the time to appeal. And section 327 of the Code only allows an amendment, where notice of appeal shall have been given in good faith, &c.; it applies to acts other than the service of notice of appeal (*BALCOM, J., dissenting*). (*Id.*)
14. An appeal will not lie to the court of appeals from an order of the general term, upon questions of the adjustment and taxation of costs (*People ex rel. Lumley* agt. *Lewis*, ante, 470).
15. An order of a judge appointing a receiver is not appealable. Neither is the order of a judge substituting one receiver in place of another appealable (*Siney* agt. *N. Y. Consolidated Stage Co.* ante, 481).
16. Under section 121 of the Code, the representatives of a deceased sole defendant, in an action after judgment and pending an appeal thereon, have the right to have themselves made parties to the appeal (*Schacharoff* agt. *Remiers*, ante, 514).
17. In an action for specific performance, each party moved for an order directing different modes of effecting a conveyance of the title to the defendant. One motion was granted at special term.

Digest.

and the other denied. On appeal, both orders were reversed at general term. No appeal lies from such orders to this court, they not making a determination of the action or preventing a judgment from which an appeal could be taken (*Roome* agt. *Phillips*, 27 N. Y. R. 357).

18. The proceeding to vacate an assessment for a local improvement in the city of New York, under chapter 338 of 1858, though conducted before a justice of the supreme court, is not a special proceeding, in the sense of the Code of Procedure (*Matter of Dodd*, 27 N. Y. R. 629).

19. The order made by the justice in vacating or refusing to vacate the assessment is final, and not subject to review here or in the supreme court (*Id.*).

20. Where one of the defendants dies before judgment, the action cannot be revived as a joint one against the survivor and the personal representatives of the deceased, but may, it seems, be revived as separate actions (*Union Bank* agt. *Mott*, 27 N. Y. R. 633).

21. Where, in such an action, a motion to revive, made with notice to the representatives of the deceased party was denied as to him, the order affects no substantial right of the plaintiff, and is not appealable (*Id.*).

22. An order of the Supreme Court, refusing permission to appeal from a judgment, after the statutory time for appealing had expired, is not appealable to this court (*Silles* agt. *Butler*, 27 N. Y. R. 638).

23. After notice of appeal is served and the proper undertaking perfected, this court is so far possessed of the cause as to be competent to make any necessary order; e. g., to dismiss the appeal; although the return of the subordinate court has not been filed (*Adams* agt. *Fox*, 27 N. Y. R., 640).

24. From an order for judgment on demurrer, unless the plaintiff should amend, no appeal lies. The case cannot be reviewed until final judgment has been entered (*Id.*).

See EVIDENCE, 2, 3, 4, 5, 6, 7.

See JURISDICTION, 1, 2.

See STAY OF PROCEEDINGS, 2.

See ACTION IN BAR, 1, 2.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 11, 12.

ARBITRATION.

1. Pending an action, the parties stipulated to submit to a referee such items of their mutual accounts as they should not agree upon: the referee not to be bound by legal rules of evidence, but satisfy himself as to the justice of the claims, his decision thereupon to be final and not appealable: any sums allowed by him to be added to or deducted from the balance upon the items agreed upon by the parties: judgment to be entered for the balance ascertained. Until such judgment the stipulation was not to interfere with the proceedings in the suit, and if judgment should be obtained in the suit while the proceedings under the stipulation were pending, the stipulation should be of no effect. The stipulation by its terms was not to be an arbitration, and no admission made by either party in the proceedings was to be admissible in evidence "if this effort to compromise shall fail." *Held*, that this was a conditional submission to arbitration, and that after an award, no other proceedings having been had in the suit, the power of the arbitrator could not be revoked so as to prevent judgment (*Merritt* agt. *Thompson*, 27 N. Y. R. 225).

2. The award is equivalent to a special verdict upon distinct issues in relation to the claims submitted, and the court may render judgment upon all the facts, as well those reported by the arbitrator as others established by the admissions in the pleadings (*Id.*).

ARREST.

1. Where a guardian received from his ward a general power of attorney, executed soon after the latter arrives at his majority, and under such power takes possession of the funds of the ward and appropriates them to his own use, he is liable to arrest for not paying over such funds when legally called upon, notwithstanding such guardian produces a letter from his ward written after he became of lawful age, but previous to the execution of the power of attorney, in which he says, "if you want to use any you are at liberty to do so" (*Wheelock* agt. *Stewart*, ante, 89).

2. The power of attorney did not confer the right to use the money, and the defendant was precluded from claiming it under the terms of the previous letter, as the power of attorney had

Digest.

superseded the letter. Besides, such contracts between a former guardian and his ward, though made after the latter becomes of lawful age, securing a benefit to the former, are suspicious, and are to be closely scrutinized, and generally disregarded by the courts (*Id.*).

3. The release of a defendant from arrest by the consent of the plaintiff's attorney, does not *per se*, operate as a discharge of the order of arrest. And the defendant is thereafter liable to arrest on final process where the judgment warrants it (*Meech agt. Loomis, ante, 209*).
4. It seems that if the order of arrest had been vacated, the defendant could not again be arrested upon final process (*Id.*).
5. If process, by virtue of which a defendant is arrested and imprisoned is void, an action against the sheriff for his escape cannot be supported (*Carpenier agt. Willett, ante, 225*).
6. Justices of the district courts in the city of New York have no authority to issue execution against the person, upon being satisfied by evidence after judgment, and *ex parte*, that the case is one for the arrest and imprisonment of the defendant. An execution issued in such a manner is void (*Id.*).
7. A justice in these courts must *adjudge* that the case is one in which the party is subject to arrest, and the right to arrest must be stated in the judgment, and form a part thereof. This is a part of his judicial labor and duty. It is a limitation of jurisdiction, and not a statutory direction to the officers of the court. After judgment the justice has no jurisdiction; he is *functus officio* (*Id.*).
8. Neither have the district courts any power to amend their judgments. They can do nothing requiring the exercise of discretion. Having rendered judgment, they are from that time mere ministerial officers (*Id.*).
9. Where a defendant in moving to discharge an order of arrest, predicates his motion on the plaintiff's affidavits, and to which he presents a response, he waives his right to object that the plaintiff's affidavits are entitled in the cause (*City Bank agt. Lumley, ante, 397*).
10. The arrest of a person here in a civil action, for fraudulent representations in the purchase of property in a foreign country, of a foreign creditor, will be

held good, where such property or its proceeds are brought here by him, although he could not have been arrested for such acts in that country. The *lex fori* and not the *lex loci* governs in such cases (*Id.*).

11. Affidavits to procure an order of arrest stating the material facts upon information and belief are sufficient, where they state the sources from which the information is derived, and the places of residence of the informants at such distance that it would be impracticable to procure their sworn statements in season to make a successful arrest. Especially where they contain positive and truthful statements enough to make out a *prima facie* case for arrest (*Id.*).

12. Where the evidence produced for an order of arrest is satisfactory that the large credit a debtor enjoyed just previous to his sudden failure, was used fraudulently to obtain a large amount of property, the fruits of which he might enjoy to the detriment of his creditors, an order of arrest should be granted by the judge and retained by the court (*Id.*).

ASSIGNMENT.

1. A verbal assignment of a demand arising on contract, to the defendant against the plaintiff, before suit brought, in these words, "I assign this claim over to you if there is any difficulty," is not good as a *set-off* or *counter-claim* (*Arnold agt. Johnston, ante, 249*).
2. A promise by the defendants to hold the proceeds of certain goods for the benefit of the plaintiffs, does not give the plaintiffs a specific lien on the goods themselves. And if the defendants, instead of selling the goods for cash and remitting the proceeds to the plaintiffs, appropriated them to the payment of their debts, the plaintiffs would have no more right to follow them into the possession of the creditors, than they would have to follow the proceeds in case the defendants sold the goods for cash and appropriated the money to the payment of the same debts. In either case it is alike merely a violation of a promise, for which they are personally responsible to the plaintiffs (*Gibson agt. Stone, ante, 468*).
3. In order to constitute an equitable assignment of the goods to the plain-

Digest.

tiffs, they must show an intent on the part of the defendants to surrender all control over the goods (*Id.*).

See EXECUTORS AND ADMINISTRATORS, 1, 2.

See CREDITOR'S SUIT, 5, 6.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. An assignment for the benefit of creditors made by a partnership firm, a part of whom are absent from the state, cannot be supported unless due authority for its execution by the absent members, or its subsequent ratification by them is proven (*Cooke* agt. *Bowles*, ante, 10).
2. A general assignment for the benefit of creditors, is such an acknowledgment or promise in writing by the assignor, as under the provisions of the Code, takes a note of the assignor, the payment of which is provided for in the assignment, out of the operation of the statute of limitations (*Trustees of Kohnstunus* agt. *Foster*, ante, 273).
3. Mere hindrance and delay is no objection to an assignment for the benefit of creditors. But if the primary and controlling purpose is to hinder and delay, then the statute is violated, and this may be the result even where the moral intention of the debtor is honest (*Eyre* agt. *Beebe*, ante, 333).
4. Where debtors stop payment and close their business in consequence of a wide spread revulsion in trade, confident that with their assets they can pay all their debts, and do not then consider it necessary to make a general assignment for the benefit of their creditors; their assignment of a portion of their assets to a person for the avowed purpose of preserving it for their creditors at large, and to prevent any unequal advantage to creditors in other states, does not disclose any fraudulent intent in relation to their general assignment, executed nearly three months later (*Id.*).
5. It is not every kind of interference by an assignor with the property of the trust, that indicates a fraudulent intent at the execution of the assignment. Any suggestion offered by him which may be useful to the trustee, to the end that his property may go as far as possible in the payment of his debts and the satisfaction of his creditors, is the exercise of his moral interest in the disposition of his property which is justifiable (*Id.*).
6. Where a general assignment for the benefit of creditors provides "that the assignee shall retain, pay and disburse all the just and reasonable expenses, costs, charges and commissions of executing and carrying into effect the assignment, including a just, reasonable and lawful compensation for his own services as such trustee:" Such provision does not invalidate the assignment (*Id.*).
7. Where an assignment conveys to the assignee the partnership and the individual property of the assignors, with a direction to pay taxes, assessments, &c., to become due on the separate real property, such direction is not to be construed that such payments are to be made from the partnership funds. (*Id.*).
8. A provision in such assignment that after payment of the partnership debts, the assignee shall pay all the private and individual debts of each assignor, is not an illegal provision. Even if it appeared in the assignment that each assignor was individually insolvent, and that the property assigned by each was unequal in value, and the debts of each unequal in proportion, still the presumption is that the assignee would do his duty and not pay the private debts of one partner with the property of the other, in the absence of any express provision to that effect in the assignment (*Id.*).
9. An assignment for the benefit of creditors, which authorizes the assignees "to pay off all the debts due and owing by the said firm of Cochran & Pollock (the assignors), or the late firm of Abbott, Pollock & Cochran, or either of the members of said firms to Cornelius Fiske" (one of the assignees), is fraudulent and void on its face, as against the creditors of the assignors (*Lester* agt. *Abbott*, ante, 488).
10. It is not material whether either of the assignors was or was not individually indebted to the assignee Fiske, at the time the assignment was made, for the assignment assumes that they were so indebted, and in effect directs him to be paid, without specifying any sum of indebtedness, and that too, in preference to the creditors of the firm or either of them, if the assignees so elect (*Id.*).
11. A creditor who, with knowledge of an assignment by his debtor fraudulent in law, upon its face, enters into an agreement with his debtor and the trustees named in the assignment for

Digest.

the management of the trust property and the distribution of its proceeds in accordance with the terms of the assignment—the performance of such agreement having been entered upon—is precluded from impeaching the assignment for such patent defect (*Repulse* agt. *Stewart*, 27 N. Y. R. 310).

12. Such agreement constitutes a good defense, and as such new matter is not available without being pleaded, an intermediate order striking it out of the answer involves the merits, and is reviewable upon an appeal from the final judgment in the action (*Id.*).
13. A provision that the trust property "be converted into cash, or otherwise disposed of to the best advantage" by the assignee, is authority to sell on credit, and avoids the assignment (*Id.*).

See ATTACHMENT, 6, 7.

See INJUNCTION, 4.

ASSIGNMENT OF COUNSEL.

1. Where *counsel* are assigned by the court to defend a prisoner on the trial of an indictment, even against their express desire, there is no constitutional or statutory provision of this state which recognizes the claim of the counsel for such services, by which they may be charged against the county, and audited and paid by the board of supervisors (*People* agt. *The Supervisors of Albany*, ante, 22).
2. Upon the principles established by the decisions of the courts of this state, to charge a county with a claim for services rendered or expenses incurred, there must be some statutory authority authorizing the same to be rendered or incurred, or directing the payment thereof, before the board of supervisors can be compelled by mandamus to audit such claim (*Id.*).

ATTACHMENT.

1. Before a *justice of the peace* is authorized to proceed with the action in which an attachment has been issued, it is necessary that he should have the *officer's return* to the attachment, showing a *service of it* in the manner provided for by the statute. It is the only manner in which the justice can acquire *jurisdiction*. The return of the officer is the *evidence* to be furnished to the justice that the statute has been complied with (*Williams* agt. *Barnaman*, ante, 59).

2. Where the defendant has had no *personal notice* of the suit, by the service of the attachment upon him, it is vitally important that the different steps prescribed by the statute should be accurately followed (*Id.*).

3. Where the return of the constable stated "that a copy of the attachment was left with Barnaman's (defendant's) wife, at Martinsville, as defendant cannot be found in this county," without an inventory, or any statement that the property had been seized under it: *Held*, that the return was so *fatally defective*, as not to afford any protection to the plaintiff in the sale he afterwards made of the property under an execution upon the judgment recovered in that suit (*Id.*).

4. On the settlement or withdrawal of proceedings on attachment issued under the Code, the *sheriff* is entitled to an amount at the rate of *poundage* on the levy of an execution (*Muller* agt. *Sauther*, ante, 87).

5. Where a plaintiff files a *notice of lis pendens*, in an attachment suit affecting real estate, it is improper to include therein any real property which the sheriff has *not levied upon* under the attachment. And where such a notice includes other premises than those levied upon, it will be held inoperative as to such additional premises. (*Fitzgerald* agt. *Blake*, ante, 110).

6. It must now be considered as settled by the court of appeals in *Rincher* agt. *Stryker* (26 *How. P. R.* 75), that the title of a *sheriff* to property seized under an attachment may be maintained against any action brought by the assignees for the benefit of creditors of the defendant in the attachment suit, notwithstanding that *no judgment has been recovered* in the attachment suit (*Kelly* agt. *Lane*, ante, 128).

7. Under section 232 of the Code, a sheriff holding an execution on a judgment in an attachment suit unsatisfied, may maintain an action in *his own name* as sheriff, to set aside as fraudulent and void an assignment of the judgment debtor's property, which has been converted into money by the assignees and deposited with a banking company so as to create the relation of debtor and creditor between the assignees and the company (*Swanland, J., dissenting*). (*Id.*)

8. The *lien* acquired by the levy of an attachment under the Code, *even on*

Digest.

- chattels* alleged to have been fraudulently assigned, will not *alone* authorize an action to set aside the assignment as fraudulent, either before or after judgment in the attachment suit (*Mechanics' and Traders' Bank* agt. *Dakin*, *ante*, 502).
9. One sued for seizing goods under an attachment may defend by proving that a prior sale by the defendant in the attachment to the claimant was made in fraud of creditors (*Hall* agt. *Stryker*, 27 N. Y. R. 696).
 10. In the affidavit to procure the attachment, it is a sufficient statement of the applicant's title that he is the owner of the demand against the debtor, "under assignment to F. H.," an assignee of the original creditor (*Id.*).
 11. Whether the plaintiff in the action for seizing the goods is at liberty to controvert the indebtedness of the defendant in the attachment suit to the plaintiff therein, *quære* (*Id.*).
 12. It seems that, as against third persons, the affidavits on which the attachment issued, if sufficient to give jurisdiction to the officer granting it, establish the character of the plaintiff therein as a creditor, and that it lies upon a claimant of the goods to establish the validity of the transfer to himself (*Id.*).
- ATTORNEYS.
1. A receiver appointed by the court in an action, can apply to the court *ex parte* for instructions respecting the management of the estate confided to his care; but the better course is to give notice to those interested in the estate (*Smith* agt. *N. Y. Consolidated Stage Co.* *ante*, 377).
 2. On such an application there seems to be no valid objection that the attorney for the plaintiffs in the action, appear as attorney and counsel for the receiver having charge of the defendant's estate. It is only when the receiver is acting *adversely* to one of the parties, that it has ever been supposed there was any impropriety in employing the counsel of the other (*Id.*).
- See ASSIGNMENT OF COUNSEL, 1, 2.
- BAILOR & BAILEE.
1. The bailee of money deposited with him under a written agreement be-
- tween A and B that it should be paid over to B upon a third person, C, expressing his satisfaction with certain documents, cannot defend an action for the deposit by B, on the ground that C, who waived the performance of the condition, was the mere agent of another person and had no interest in the matter of the agreement or in the money, and that such waiver was fraudulently made to enable B to obtain money to which he was not entitled (*McKay* agt. *Draper*, 27 N. Y. R. 256).
2. The way for the bailee to protect the interest of the real principal is to bring an action of interpleader, or, after an action has been commenced against himself, to apply to have the principal substituted in his place as defendant, under § 122 of the Code (*Id.*).
- BANKS.
1. Where a bank takes stock from an individual as collateral security to the payment of his promissory note, and then sells the stock, and subsequently on the expiration of their charter, they assign all their property and assets for a valuable consideration, to a new and distant bank formed under another law, the latter assuming specifically certain debts and liabilities as a part of such consideration; the owner of the stock cannot maintain an action against the latter bank for the value of the stock on tendering the amount of the note, where there is no proof that the latter bank ever received any amount sufficient to pay the claim, or any other claims against the old bank (*Hoffman* agt. *Van Nostrand* *ante*, 115).
 2. Proposals for a contract, requiring as security the certificate of a bank that it holds a deposit of \$4,000 "in cash," are satisfied by a certificate of the deposit of \$4,000, without further specification (*People* agt. *The Contracting Board*, 27 N. Y. R., 378).
 3. The act to enforce the liability of stockholders in banking corporations (ch. 224 of 1849) subjects each stockholder to a several liability for a ratable share of the debts in proportion to the whole capital stock and the whole indebtedness of the bank, without reference to the solvency of any other stockholder (*Matter of the Hollister Bank*, 27 N. Y. R. 393).
 4. When one assessment has been made upon the stockholders for their respective shares of the liabilities of the

Digest.

bank, and has been confirmed, and it remains in force, no second assessment can be made to supply a deficiency resulting from the inability to collect the sums assessed on insolvent stockholders (*Id.*).

5. The act of Congress passed February 25, 1862 (ch. 33), making certain treasury notes of the United States a legal tender in payment of debts between private persons, is constitutional and valid (*Metropolitan Bank* agt. *Van Dyck*, 27 N. Y. R. 400).
6. The power to borrow money on the credit of the United States carries with it, it seems, the power to attach the quality of a legal tender to the notes issued, when, in the judgment of Congress it is necessary to make them effectual for the purpose of borrowing (*Id.*).
7. The validity of this provision, as an exercise by Congress of the power to regulate commerce, discussed and maintained by MARVIN, J. (*Id.*).
8. The provision of the Constitution of this State (art. 8, § 6), that the legislature shall require the redemption in specie of all bills and notes put in circulation as money, is not self-executing, so that the refusal of a bank to redeem its bills in specie authorizes the Bank Superintendent to sell the securities deposited with him (*Id.*).
9. Until the legislature shall require the redemption of bank bills in specie, an offer to pay in treasury notes made a legal tender by act of Congress is sufficient under the general banking law (ch. 260 of 1838, § 4), which only authorizes a sale of the securities upon default in paying such bills in "lawful money of the United States" (*Id.*).

See TAXES AND ASSESSMENTS, 5, 6.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. The giving of the *promissory note* of the purchaser of personal property for over \$50, to the vendor for the purchase price thereof, is not a *payment* within the statute of frauds, so as to pass the title to the property to the purchaser (*Ireland* agt. *Johnson*, ante, 463).
2. The holders of a promissory note, without the knowledge or consent of the indorser, procured a third person to subscribe it for the purpose of adding to their security. The subscription was the same in form as if he had been an original maker. This is not such an alteration as to vitiate the note or discharge the indorser (*McCaukey* agt. *Smith*, 27 N. Y. R. 39).
3. A single seal appended to a notary's certificate of protest is a sufficient authentication of his certificate beneath the seal, and on the same page, of the service of notice of non-payment (*Olcott* agt. *Tioga Railroad Company*, 27 N. Y. R. 546).
4. If a bill of exchange, payable in a specified length of time after date or on a day certain, be presented for acceptance on the day it is due, and if acceptance be then refused, no further demand of payment is necessary to charge the drawer or indorser (*Plato* agt. *Reynolds*, 27 N. Y. R. 586).

BILLS OF PARTICULARS.

1. A *bill of particulars* in an action for an indebtedness, should state the items of the demand, and when and how it arose, and the sums claimed (*Moran* agt. *Morrissey*, ante, 100).
2. Assuming the court to have the power to order a *bill of particulars* after the issues in the cause have been referred to a referee to hear and determine, it will not be exercised to interrupt a trial actually proceeding before him (*Cadwell* agt. *Goodenough*, ante, 479).

CALENDAR.

1. By section 307 of the Code the *term fees* (\$10) of causes noticed and put upon the calendar of the court of appeals for argument, are limited to five terms (*Fullerton* agt. *Viall*, ante, 224).
2. *Motions to correct the calendar* at the circuit, should be made on the *first day* of the circuit, which generally occurs on Monday. It is too late to make such motions on Thursday of the first week of the circuit (*Anonymous*, ante, 394).
3. Another decision that no more than *five term fees* for noticing and putting a cause on the calendar of the *court of appeals*, can be allowed and taxed (*Richmond* agt. *Sherman*, ante, 491).

CAUSE OF ACTION.

1. An action by a *shareholder of an unincorporated joint stock company* against a defendant as the president and treasurer of the company, to compel an accounting of the whole pro-

Digest.

- party, and an investigation into its whole affairs and business, cannot be sustained without making all the shareholders parties; or unless commenced by the plaintiff for the benefit of all others standing in the same situation, as well as for himself (*Warth* agt. *Radde*, *ante*, 230).
2. A cause of action against a defendant, under a contract made by him individually, for a specific sum of money, cannot be joined with a cause of action against him as the president or trustee of an association (*Id.*).
 3. Neither can the claim against the defendant alone, be united with causes of action against him and others jointly. The causes of action must not only all belong to one of the enumerated classes under section 167, but all must affect all the parties to it (*Id.*).
 4. A complaint, charging that the defendants had fraudulently overdrawn money from the plaintiff, a bank, and demanding judgment for the amount of the overdraft, and for execution against the bodies as well as property of the defendants, is, *it seems*, to be regarded as founded in tort (*Union Bank* agt. *Mott*, 27 N. Y. R. 633).

See CREDITOR'S SUIT, 4.

CLAIM AND DELIVERY.

1. In an action of *replevin* for the wrongful detention of goods sold by the plaintiff to the purchaser (the credit unexpired), the action proceeds in *disaffirmance of the contract* under which the goods were purchased; and the plaintiff is bound to show a justifiable reason for repudiating the contract before he can recover in the action. Such a reason is shown where fraudulent misrepresentations of the purchaser's solvency at the time the purchase was made, are clearly proved (*White* agt. *Dodds*, *ante*, 197).
2. No distinct act of disaffirmance of such a contract beyond claiming the property, has ever been held to be necessary as against the wrong-doer. But in case any money or property has been received under the contract, the law requires that such money or property must be *restored* before the disaffirmance can become effectual. And this restoration it is not necessary should be made before suit brought; it may be made at the trial (*Id.*).
3. If a person obtains possession of goods by fraud, the act is wrongful and con-

fers no title. No notice is necessary to the offender, and no demand need be made on him (*Id.*).

4. As against the *general assignee* of the wrong-doer, who obtains possession of the goods peaceably, by manual delivery from the wrong-doer, although a demand of the property before suit brought may be necessary, it is not necessary to accompany or precede that demand by a declaration of disaffirmance of the contract, and that such disaffirmance is on the ground of fraud perpetrated by the assignor in making the original purchase (*Id.*).
5. There is no legal obligation on the true owner of the goods to disclose the source or the particulars of his title. This is as in other cases developed at the trial (*Id.*).
6. The decision in *Allen v. Crary* (10 Wend. 349), that *replevin* lies by the owner of chattels against one who had no possession or connection therewith other than to direct a sheriff to levy an execution in his favor upon them, approved and affirmed (*Knapp* agt. *Smith*, 27 N. Y. R. 277).

See SHERIFF, 11, 12.

See ATTACHMENT, 9, 10, 11, 12.

COMMON CARRIERS.

1. It must now be considered as settled in this state that *common carriers* may limit their liability for negligence in almost any respect by *express contract*, for such consideration as will be satisfactory to the passenger or freighter, and that such contracts are not against public policy (*Lee* agt. *Marsh*, *ante*, 275).
2. Where a common carrier is not liable for the effects of an accident by which a part of his freight of live animals have been killed, he is not liable for the delivery of the dead animals, where his contract is to deliver them alive (*Id.*).

COMPLAINT.

1. The plaintiff has a right to amend his complaint of course, and without costs, changing the place of trial, after the service of the answer (*Stryker* agt. *The N. Y. Exchange Bank*, *ante*, 20).
2. In an action for money alleged to have been lost by the plaintiff at play, a complaint similar to a declaration in *indebitatus assumpsit*, under the former practice is not sufficient. The

Digest.

complaint must be *special*; the plaintiff must set out the facts and bring himself within the statute by force of which he claims to recover (*Moran* agt. *Morrissey*, *ante*, 20).

3. Where it is averred in a complaint that the plaintiff owned the property in question, and loaned it to the defendant, and that it had been demanded of him and he had refused to deliver it, and converted it to his own use, these allegations are sufficient to constitute the action one of *tort*, notwithstanding the *agreement* under which the defendant received possession of the property is stated in the complaint (*Person* agt. *Civer*, *ante*, 139).
4. A complaint, charging that the defendants had fraudulently overdrawn money from the plaintiff, a bank, and demanding judgment for the amount of the overdraft, and for execution against the bodies as well as property of the defendants, is, *if seems*, to be regarded as founded in *tort* (*Union Bank* agt. *Mott*, 27 N. Y. R. 633).

See RECEIVER, 3.

See CREDITOR'S SUIT 1, 2, 3.

See NON-SUIT, 1.

CONSTITUTIONAL LAW.

1. The 4th and 5th sections of the act of congress, passed March 3, 1863, entitled "An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases," are *unconstitutional and void* (*Benjamin* agt. *Murray*, *ante*, 193).
2. The President of the United States, before the passage of this act, had no power of irresponsible arrest at his will, and without process or color of law. This is *arbitrary power*. The President has no arbitrary power and *congress has none to give him*. It has no power to declare his orders a defence to those who execute it, if not otherwise legal (*Id.*).
3. This court has *jurisdiction* in an action for a violation of the plaintiff's right to liberty, unless it is deprived of it by this act of congress. This is solely determined by the validity of the act itself; and it is the duty of the court to decide upon that question when properly brought before it (*Id.*).
4. It is not enough that this act of congress is sufficient constitutionally to confer jurisdiction upon the United States court. It must also be sufficient to destroy the jurisdiction of the

supreme court of this state, before this court is authorized to turn the plaintiff over to the United States court for redress. (*The decision of the court is Jones* agt. *Seward*, 26 How. Pr. 433, *not concurred in.* (*Id.*).

5. The act of the legislature entitled "An act to provide for compensating parties whose property may be destroyed in consequence of mobs or riots," passed April 13th, 1855, is a valid and constitutional act of legislation (*Darlington* agt. *Mayor, &c. of New York*, *ante*, 352).
6. Judgments rendered pursuant to the provisions of that act, for riot damages, have the same force against the property of the city as judgments recovered for any other cause of action (*Id.*).
7. *It seems* that the act incorporating the Susquehanna Bridge Company (ch. 89 of 1895, § 38), and made applicable to the Chenango Bridge Company (ch. 119 of 1898), does not, by giving it all the rights of the Delaware Bridge Company, confer upon it the benefit of a provision in favor of the latter company that no bridge should be erected within two miles of its bridge across the Delaware, so as to guarantee the former against the erection of a bridge within the like distance from its bridge across the Chenango: *Per Wright, DAVIES and MARVIN, Js. (Chenango Bridge Co. agt. Biaghams Bridge Co. 27 N. Y. R. 87).*
8. But if that be otherwise, the provision that it shall not be lawful for any person to erect such bridge, or to establish a ferry, within two miles, is to be construed as prohibiting the establishment of a bridge or ferry under the laws then existing, and not as a contract, by which the legislature renounced its power to authorize such bridge or ferry at any future time (*Id.*).
9. Chapter 412 of 1862, providing for the settlement by a reference of controversies between the receiver of an insolvent mutual insurance company and its members or stockholders, is constitutional (*Sands* agt. *Kimberk*, 27 N. Y. R. 147).
10. Such controversies respecting the adjustment and administration of a *quasi* trust fund, in which a multitude of persons are concerned as contributors and distributees, have, by the customary law of this state, antecedent to the constitutional provision for preserving trial by jury, been regarded

Digest.

- as of equitable and summary cognizance, and are not among the cases in which the trial by jury has been heretofore used so as to be fastened among rights to remain inviolate (*Id.*).
11. Digging a ditch upon the land of a private owner, under the authority of the legislature, for the purpose of draining such land and that of the adjoining proprietors, is, it seems, a taking of property within art. 1, §§ 6, 7, of the constitution of 1846; and the act of the legislature professing to authorize such taking is so far void, unless it provides for the payment of a just compensation, to be ascertained by a jury or by commissioners appointed by a court of record (*People* agt. *Nearing*, 27 N. Y. R. 304).
 12. The mode, however, of apportioning and assessing such compensation and the expenses of executing the work, upon those benefited thereby, is wholly within the discretion of the legislature (*Id.*).
 13. Upon a certiorari to the commissioners charged with the execution, of such a work, and the assessment of the expenses of its execution, the only question brought up is on the legality and regularity of their proceedings in making the assessment (*Id.*).
 14. The relator's remedy for the invasion of his land is trespass or ejectment (*Id.*).
 15. The act of congress passed February 25, 1862 (ch. 33), making certain treasury notes of the United States a legal tender in payment of debts between private persons, is constitutional and valid (*Metropolitan Bank* agt. *Van Dyck*, 27 N. Y. R. 400).
 16. The power to borrow money on the credit of the United States carries with it, it seems, the power to attach the quality of a legal tender to the notes issued, when, in the judgment of Congress, it is necessary to make them effectual for the purpose of borrowing (*Id.*).
 17. The validity of this provision, as an exercise by congress of the power to regulate commerce, discussed and maintained by MARVIN, J. (*Id.*).
 18. The provision of the Constitution of this State (art. 8, § 6), that the legislature shall require the redemption in specie of all bills and notes put in circulation as money, is not self-executing, so that the refusal of a bank to redeem its bills in specie authorizes the Bank Superintendent to sell the securities deposited with him (*Id.*).
 19. Until the legislature shall require the redemption of bank bills in specie, an offer to pay in treasury notes made a legal tender by act of congress is sufficient under the general banking law (ch. 260 of 1863, § 4), which only authorizes a sale of the securities upon default in paying such bills in "lawful money of the United States" (*Id.*).
- See MUNICIPAL CORPORATIONS, 13, 14, 15, 16.

CONTRACT.

- See CLAIM AND DELIVERY OF PERSONAL PROPERTY, 1, 2, 3, 4, 5.
 See COMMON CARRIERS, 1, 2.
 See SALE, 6, 7, 8, 9, 10, 11.
 See CONSTITUTIONAL LAW, 7, 8.
 See SPECIFIC PERFORMANCE, 1.
 See PRINCIPAL AND AGENT, 1.
 See CONSIGNOR AND CONSIGNEE, 1, 2, 3.
 See CONTRACTING BOARD.

CONTRACTING BOARD.

1. Proposals for a contract, requiring as security the certificate of a bank that it holds a deposit of \$4,000 "in cash," are satisfied by a certificate of the deposit of \$4,000, without further specification (*People* agt. *The Contracting Board*, 27 N. Y. R. 378).
2. The law requiring the canal contracting board to award contracts for repairs to "the lowest bidder who will give adequate security," and it having made an award, a lower bidder who has given the security required is not entitled to a mandamus (*Id.*).
3. Though the practice of issuing a peremptory mandamus in the first instance is not to be commended, it is within the power of the court; and the objection, that an alternative writ should have first issued, is not available on error (*Id.*).

CORPORATIONS.

1. Corporations are to be included under the general term "persons," in regard to their liability to taxation in the place where they carry on their business (*British Commercial Life Ins. Co.* agt. *The Commissioners of Taxes*, N. Y., ante, 41).

Digest.

See TAXES AND ASSESSMENTS, 1, 2, 3, 4.

See RAILROADS.

See MUNICIPAL CORPORATIONS.

See TRUSTEES, 1.

COSTS.

1. On the settlement or withdrawal of proceedings on *attachment* issued under the Code, the *sheriff* is entitled to an amount at the rate of *poundage* on the levy of an execution (*Muller* agt. *Sautler*, ante, 87).
2. Where the circuit judge on the rendition of a verdict of the jury for the defendant, on the same day sets it aside and grants a new trial upon his minutes, on the sole ground that the verdict is *against evidence*, it should be on *payment of costs by the plaintiff*, and not that the costs abide the event (*Obering* agt. *Russell*, ante 151).
3. The rule is well settled, and the Code has not abrogated it, that a verdict should not be set aside on the sole ground that it is *against evidence*, except on payment of costs by the party against whom it is rendered (*Id.*).
4. The costs of an action are to be taxed according to the fee bill existing at the time of the verdict or dismissal of the complaint; and this, notwithstanding proceedings thereon are stayed (*Scudder* agt. *Gori*, ante, 165).
5. On a motion at special term for a new trial upon a case, costs are to be granted as upon an appeal from a judgment. Construction of section 307 of the Code (*Id.*).
6. Costs in actions of *mandamus* are not affected by the fee bills of 1840, or the Code, and are still to be taxed under the fee bill contained in the Revised Statutes (*People ex rel. Lumley* agt. *Lewis*, ante, 159).
7. The rule of *stare decisis* must command some respect both from the bar and the bench (*Id.*).
8. A county judge has power to tax costs under the old fee bill (*Id.*).
9. A party desiring a *re-taxation* of costs must move without delay, and the motion must be founded on the papers used before the taxing officer below (*Id.*).
10. A general objection to every item in a bill of costs as *illegal, &c.*, is not available on motion for *re-taxation* (*Id.*).
11. A *term fee* of \$10 is given by the Code (§ 307) for every term when the cause is necessarily on the calendar and is *not tried*; but when *tried* no *term fee* is *allowed*, but a *trial fee* instead thereof (*Place* agt. *The Butter-nuts Woolen and Cotton Manufacturing Co.*, ante, 184).
12. By section 307 of the Code the *term fees* (\$10) of causes noticed and put upon the calendar of the court of appeals for argument, are limited to *five terms* (*Fullerton* agt. *Viall*, ante, 224).
13. A party is not entitled to *fees* as a *witness* of his adversary, where he succeeds in the action, for testifying in his own behalf, notwithstanding he makes an affidavit that he would not have attended the trial but for the purpose of being such witness. (*The several reported conflicting decisions on this question referred to as irreconcilable*) (*Steele* agt. *Miller*, ante, 266).
14. Where the statute provides for *double costs*, it is unnecessary for an appellate court to mention them in their decision; and it is the duty of the clerk to tax them in the judgment (*Carpentier* agt. *Willitt*, ante, 376).
15. The death of a party in an action cannot change the rights of the other parties; it merely changes the title of the action, and a revival in favor of the representatives is permitted for the purpose of protecting the interests of the estate of the deceased (*Id.*).
16. Where the defendant died in February, and the action was revived in March following, the *term fees* in the court of appeals for the March and June terms were properly taxable, as one notice for the year in that court is sufficient (*Id.*).
17. An appeal will not lie to the court of appeals from an order of the general term, upon questions of the *adjustment and taxation of costs* (*People ex rel. Lumley* agt. *Lewis*, ante, 470).
18. Another decision that no more than *five term fees* for noticing and putting a cause on the calendar of the court of appeals, can be allowed and taxed (*Richmond* agt. *Sherman*, ante, 491).
19. The statute prohibiting the recovery of costs in actions at law against executors and administrators, where payment has not been unreasonably refused or neglected, does not apply to suits commenced against the testator or intestate in his lifetime (*Merritt* agt. *Thompson*, 21 N. Y. R. 225).

Digest.

COUNTER-CLAIM.

1. A verbal assignment of a demand arising on contract, to the defendant against the plaintiff, before suit brought, in these words, "I assign this claim over to you, if there is any difficulty," is not good as a set-off or counterclaim (*Arnold* agt. *Johnston*, ante, 249).

COURT OF GENERAL SESSIONS.

1. The general sessions of New York, having protracted its regular period of sitting, in the trial of a cause, was lawfully in session for the purpose of passing judgment in another cause in which a conviction had been had prior to the commencement of the trial which prolonged the sitting (*Lowenberg* agt. *The People*, 27 N. Y. R. 336).
2. It seems that the court of general sessions of the county of New York is within the statute (ch. 208 of 1859), authorizing courts of sessions in any county to continue its sitting at any term as long as may be necessary: *Per BALCOM, J. (Id.)*.

CREDITOR'S SUIT.

1. Where an action is brought by a creditor under an assignment for the benefit of creditors, against the assignee and all other creditors who choose to come in and avail themselves of the benefits of the action, and demands judgment that the assignment be reformed and corrected in a particular which is not common to all the creditors but concerns the plaintiff, and that the assignee be required to account, the complaint is not demurrable for a defect of parties plaintiffs (*Garner* agt. *Wright*, ante, 92).
2. 1st. Because the creditors are not all united in interest in respect to the reformation of the assignment. 2d. They are not all united in interest with the plaintiff in all the relief sought by the plaintiff, which is a sufficient excuse for not joining them as plaintiffs (*Id.*).
3. The relief claimed in such an action is not inconsistent, and there is really but one cause of action stated, arising out of one transaction (*Id.*).
4. A cause of action in the nature of a creditor's bill, does not accrue until after the recovery of judgment and the return of execution unsatisfied, in the common law action. The statute

of limitations therefore is not a bar to such an action until six years from the return of such execution (*Eyre* agt. *Beebe*, ante, 333).

5. The lien acquired by the levy of an attachment under the Code, even on chattels alleged to have been fraudulently assigned, will not alone authorize an action to set aside the assignment as fraudulent, either before or after judgment in the attachment suit (*Mechanics' & Traders' Bank* agt. *Dakin*, ante, 502).
6. An assignment of a bond and mortgage by a non-resident debtor, alleged to be fraudulent, does not authorize the judgment creditor to bring an action to set aside the assignment as a fraudulent obstruction, and to remove it out of the way of his execution, for the plaintiff could not reach or sell the bond and mortgage or the mortgage debt, by or under his execution, if the assignment were declared fraudulent and void, nor could he even if the assignment had not been made by the debtor (*Id.*).
7. A judgment creditor, having no title or specific lien, may maintain an action to obtain the cancellation of prior judgments which are apparent liens upon the lands of his debtor, but which he alleges to have been paid, and this without alleging any collusion on the part of the debtor to keep the judgments on foot to defraud his creditors (*Shaw* agt. *Dwight*, 27 N. Y. R. 244).
8. It is unnecessary, to maintain such action, that the creditor should have issued execution to the county in which the lands lie. It is sufficient that an execution has been returned unsatisfied in the county where the debtor resides, and that his judgment is a lien on the land (*Id.*).

See INJUNCTION, 4.

CRIMINAL LAW.

1. Where the crime of murder was committed while the act of 1860 was in full operation, the subsequent sentences of the convict should be the one prescribed by that act: That is, that he should suffer the punishment of death, after imprisonment at hard labor in the state prison for one year, &c., although that act does not in terms prescribe the punishment of death (*Ratley* agt. *The People*, ante, 112).

Digest.

2. The repeal of the act of 1860 by the act of 1862 (*chap. 197, p. 358*), was wholly prospective, and did not affect the punishment of offences committed before such repeal (*Id.*).
 3. Where a prisoner on trial for murder is found guilty, and before sentence, the legislature pass an act which in effect declares that when an *erroneous judgment is given in a court of original criminal jurisdiction*, the supreme court may, on error, reverse the judgment alone; but if there be no error in the trial or verdict, the record is to be remitted, to the end that a proper judgment may be pronounced:
 4. *Held*, that this act having been passed after the conviction in this case, though before the sentence or judgment was passed upon the prisoner, it applied to the case, and required the appellate court, on determining that the original judgment was erroneous, to remit the case to the oyer and terminer, with directions to pronounce the proper judgment, instead of discharging the prisoner (*Id.*).
 5. A sentence which is proper for burglary in the second degree, for which crime the prisoner was indicted, tried and convicted, will not be reversed for the reason that the court who pronounced the sentence probably supposed from an indorsement on the indictment that he was convicted of burglary in the first degree (*Irving agt. The People, ante, 205*).
 6. In an indictment for bigamy, it is unnecessary to negative the exceptions, although they are referred to in the section defining the offence. (2 R. S., p. 687, § 8, *et seq.*) As matter of pleading, as well as proof, it lies upon the defendant to bring himself within the exceptions (*Fleming agt. The People, 27 N. Y. R. 329*).
 7. The statute (2 R. S. p. 728, § 52), cures the formal defect, if it were one, of not negating the provisos (*Id.*).
 8. General evidence that a marriage was celebrated according to the forms of the church, or of a religious sect, implies the requisite assent of the parties. It is for the prisoner to go into particulars and negative their declaration of assent, before he can deny the apparent effect of the evidence (*Id.*).
 9. The general sessions of New York, having protracted its regular period of sitting, in the trial of a cause, was lawfully in session for the purpose of passing judgment in another cause in which a conviction had been had prior to the commencement of the trial which prolonged the sitting (*Lowenberg agt. The People, 27 N. Y. R. 336*).
 10. *It seems* that the mode of general sessions of the county of New York is within the statute (*ch. 208 of 1859*), authorising courts of sessions in any county to continue its sitting at any term as long as may be necessary: *Per BALCOM, J. (Id.)*.
 11. The act in relation to capital punishment (*ch. 410 of 1860*) did not abolish the penalty of death for murder in the first degree (*Id.*).
 12. *It seems* that the mode of execution by hanging was established by the common law, and, not having been abrogated by that statute, was the legal method of execution while such act was in force, notwithstanding its repeal of the Revised Statute prescribing that punishment: *Per BALCOM, J. (Id.)*.
 13. It is not a sufficient challenge for principal cause that a juror had formed an opinion that the prisoner had killed the person for whose murder he was indicted. Killing being but one element of the crime, is consistent with the prisoner's innocence of murder (*Id.*).
 14. Upon a conviction under the act of 1860, the court could not fix the day of execution (*Id.*).
 15. The proper form of sentence under the act of 1860 indicated: *Per BALCOM, J. (Id.)*.
 16. Where the court of general sessions improperly sentenced the prisoner to be executed on a fixed day, that being the only error in the proceedings, and the supreme court, after the day fixed for execution had passed, affirmed the judgment, without fixing a new day for execution, *held*, that the erroneous part of the sentence being void and having become, by the lapse of time, incapable of any operation, the error was cured (*Id.*).
- CURRENCY.
1. Where a loan of money in English currency, is made in England to be paid in New York, the *pound sterling* is to be estimated here at its *real market value*, and not as its *par value* (*Robinson agt. Hall, ante, 342*).
 2. The act of Congress passed February 25, 1862 (*ch. 33*), making certain

Digest.

treasury notes of the United States a legal tender in payment of debts between private persons, is constitutional and valid (*Metropolitan Bank agt. Van Dyck*, 27 N. Y. R. 400).

3. The power to borrow money on the credit of the United States carries with it, it seems, the power to attach the quality of a legal tender to the notes issued, when, in the judgment of congress, it is necessary to make them effectual for the purpose of borrowing (*Id.*).
4. The validity of this provision, as an exercise by congress of the power to regulate commerce, discussed and maintained by MARVIN, J. (*Id.*).
5. The provision of the constitution of this state (*art. 8, § 6*), that the legislature shall require the redemption in specie of all bills and notes put in circulation as money, is not self-executing, so that the refusal of a bank to redeem its bills in specie authorizes the bank superintendent to sell the securities deposited with him (*Id.*).
6. Until the legislature shall require the redemption of bank bills in specie, an offer to pay in treasury notes made a legal tender by act of congress is sufficient under the general banking law (*ch. 260 of 1838, § 4*), which only authorizes a sale of the securities upon default in paying such bills in "lawful money of the United States" (*Id.*).
3. A justice in these courts must *adjudge* that the case is one in which the party is *subject to arrest*, and the *right to arrest must be stated in the judgment*, and form a part thereof. This is a part of his judicial labor and duty. It is a limitation of jurisdiction, and not a statutory direction to the officers of the court. *After judgment* the justice has no jurisdiction; he is *functus officio* (*Id.*).
4. Neither have the district courts any power to *amend their judgments*. They can do nothing requiring the exercise of *discretion*. Having rendered judgment, they are from that time ministerial officers (*Id.*).

DIVORCE.

1. To entitle the plaintiff to *alimony and counsel fee*, in an action for divorce for cruel and inhuman treatment, she must make it appear that she has been injured, and present a meritorious cause of action (*Solomon agt. Solomon, ante*, 218).
2. A *single instance of cruelty* is not sufficient cause to authorize the court to interfere, although vague charges of cruel treatment are also made against the husband. The parties to a marriage contract should bear long and patiently with each other; they should exercise the most forgiving spirit, and seek by all possible means to reconcile their differences, before resorting either to the protection or the process of law to redress their wrongs. They should become fully satisfied that there was no longer any possibility that the duties of their married life can be discharged (*Id.*).
3. In an action of *divorce for adultery*, the defendant on showing the court a reasonable prospect of establishing the defence, may have leave to *amend or file a supplemental answer*, by setting up the defence of *adultery* against the plaintiff, having discovered the fact after the issues in the cause were first joined (*Strong agt. Strong, ante*, 432).

ELECTION.

1. The provisions of the 59th section of the *district court act* of the city of New York, are *directory merely*. They impose a mere ministerial duty upon the clerks of those courts, the omission to perform which would not invalidate a judgment which had been regularly recovered; although the docket and a transcript is made evidence, there is nothing in the act which makes it the only evidence. And if the clerk should wholly neglect to make up his docket, the plaintiff in any suit or proceeding where it became necessary, could prove by *other evidence* the recovering of his judgment (*Carpenter agt. Simmons, ante*, 12).
2. Justices of the *district courts* in the city of New York have no authority to issue *execution against the person*, upon being satisfied by evidence *after judgment*, and *ex parte*, that the case is one for the *arrest and imprisonment* of the defendant. An execution issued in such a manner is *void* (*Carpenter agt. Willett, ante*, 225).
1. Upon the trial of a *quo warranto* to determine the title to an office depending upon a general election, the question is who received the most legal votes (*People ex rel. agt. Pease*, 27 N. Y. R. 45).
2. The inspectors of elections are not judicial, but administrative officers:

Digest.

their decision is final only as to receiving or rejecting votes; but the question whether a voter was or was not entitled to vote, is open to examination in subsequent proceedings upon any competent evidence (*Id.*).

3. It seems that the inspectors have no authority to reject a vote except in the special cases where it is expressly given by the statute, as when the voter refuses to take the oath, or to answer questions, stands convicted of crime, or has made a bet on the election (*Id.*).
4. A voter called as a witness may be asked for whom he voted, and, if he declines or is unable to state, circumstantial evidence may be used to ascertain the fact, and he may be asked for whom he intended to vote, as one of the circumstances bearing upon the question (*Id.*).
5. For the purpose of showing that a person voted, the poll-list kept at the election is admissible, though not signed by the inspectors or clerks, having no heading denoting its character, and never having been filed in the town clerk's office (*Id.*).
6. Where a voter is proved to have been alien born, and there is *prima facie* evidence that he had not become a citizen by naturalization or otherwise, the burden of showing that he has become a citizen is cast on the party desiring to retain the vote; and, in the absence of such evidence, the vote is to be disallowed (*Id.*).
7. But where the evidence is only that one had voted and was alien born, the presumption is that he voted legally, and had qualified himself by naturalization (*Id.*).

EVIDENCE.

1. Where, on the trial a fair question is presented to the court and jury or a referee upon conflicting evidence, whether the defendant is indebted in the amount claimed by the plaintiff, or as admitted by himself in a certain sum less than the plaintiff's claim, and the court and jury or referee find the indebtedness to be the amount claimed by the plaintiff; the conclusion upon that question of fact is not the subject of review in this court (*Kert agt. McGuire, ante, 27*).
2. A question put to a witness, "Do you know the general price of ale at the brewery in 1860 and 1861?" was objected to on the ground that it was

too general—that it was not evidence of the market value of ale or beer alleged to have been purchased in April, May, June and July, 1861, *Held*, that the objection could not prevail, as it was not shown that the price varied during the two years; and the answer of the witness, to which no objection was taken, showed that it was the same for those years (*Id.*).

3. Another question was put to the witness, "Do you know the general market value of ale and beer during the years 1860 and 1861?" which was objected to on the ground that the price of ale and beer sold to the defendant cannot be proved by proving its general market value: *Held*, that the objection was frivolous. There was no proof of any express contract as to the price of ale sold to the defendant, and it was clearly competent to show the market value of the article (*Id.*).
4. Another question was put to a witness, who had been a book-keeper in a brewery over four years, to wit: "Do you know the general market price of ale and beer in the city of New York during the years 1860 and 1861?" which was objected to on the ground that the witness was a book-keeper—had never bought or sold ale or beer, and never saw any bought or sold, and was therefore incompetent to testify to its value: *Held*, that the witness had acted as book-keeper in the breweries of the city for over four years and was necessarily acquainted with the market price of beer and ale, and was competent to testify to the general market price of those articles (*Id.*).
5. The defendant was sworn as a witness on his own behalf, and was asked to state whether or not he had paid for the goods mentioned in the plaintiff's bill of particulars. The plaintiff objected to the question as tending to inquire as to transactions had between the defendant and the deceased, concerning which he was incompetent to testify; the answer was allowed, reserving the right to the plaintiff to move to strike out the testimony if improper. The defendant answered that he had paid the whole bill except \$20. On cross-examination the witness answered that he received the sixty hogsheads of stock ale set forth in the bill of particulars (the claim in suit for \$600), and that he paid Harrison (deceased) himself personally for them in his own store, about a week after he received them. *Held*,

Digest.

- that the granting of the plaintiff's motion to strike out all this testimony of the defendant was not error (*Id.*).
6. The general rules of practice requiring a *written notice* to produce papers, has reference to the preliminary preparations for trial. The reason for the rule does not apply to a notice given in the presence and hearing of the court while the trial is in progress from day to day (*Id.*).
 7. Therefore, where at a previous hearing before the referee, the plaintiff had given the defendant verbal notice to produce certain bills and receipts, or that parole evidence of their contents would be given: *Held*, that such notice was sufficient (*Id.*).
 8. Witnesses cannot testify to the *value* of an article without *knowledge* of it. Thus, if witnesses testify that they have no personal knowledge of the *qualities* of a cow, they cannot be permitted to testify as to the *value* of her use for a given time. Assuming that she was an *ordinary* cow does not authorize the testimony (*Thorn* agt. *Couchman*, ante, 95).
 9. Where a sole *single issue* of fact is presented for the consideration of a jury as to what is the proper construction and meaning to be given to a clause in a contract of sale in these words, "plain seasonable No. 1 (buffalo) robes," to settle the quality of the article thus described, and six witnesses testify on that particular issue, *four* for the plaintiff and *two* for the defendant, their verdict for the defendant must be considered on appeal as *conclusive* (*Murphy* agt. *Baker*, ante, 251).
 10. The court can never exclude relevant testimony because it does not establish *at once* the issue to which it relates; the different links must be introduced in succession. The party against whom it is introduced is amply protected against any prejudice, by his right to call on the court to direct the jury to disregard it for all purposes where it is not *prima facie* evidence of any material issue. It is no ground of complaint that the court in such a case has not volunteered to warn the jury against being misled, or a reason to grant a new trial on the ground of an oversight (*Id.*).
 11. Where every *exception* in the case bears on matters not relating to the sole issue submitted to the jury, and *evidence* is rejected not bearing on
- such issue, although competent for other purposes, the exception to it will not lie (*Id.*).
12. Evidence by an assumed principal that her husband was acting as her agent, and the inquiry of another witness whether the wife had been in possession of a farm on which she and her husband lived, are not objectionable on the ground of involving legal conclusions (*Knapp* agt. *Smith*, 27 N. Y. R. 277).
 13. In an indictment for bigamy, it is unnecessary to negative the exceptions, although they are referred to in the section defining the offence. (2 R. S. p. 687, § 8 *et seq.*) As matter of pleading, as well as proof, it lies upon the defendant to bring himself within the exceptions (*Fleming* agt. *The People*, 27 N. Y. R. 319).
 14. The statute (2 R. S. p. 728, § 52) cures the formal defect, if it were one, of not negating the provisos (*Id.*).
 15. General evidence that a marriage was celebrated according to the forms of the Church, or of a religious sect, implies the requisite assent of the parties. It is for the prisoner to go into particulars and negative their declaration of assent, before he can deny the apparent effect of the evidence (*Id.*).
 16. It is inadmissible to discredit a witness by contradicting him in respect to a mere collateral fact, as to which he testified on cross-examination without objection (*Plato* agt. *Reynolds*, 27 N. Y. R. 586).
- See MORTGAGE OF CHATTELS, 3, 4.
 See INSURANCE, 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14.
 See RAILROADS, 3, 4, 5, 6, 7, 8.

EXCEPTIONS.

1. Where every *exception* in the case bears on matters not relating to the sole issue submitted to the jury, and *evidence* is rejected not bearing on such issue, although competent for other purposes, the exception to it will not lie (*Murphy* agt. *Baker*, ante, 251).

See ADMIRALTY, 2, 3, 4, 5.

EXCISE LAW.

1. A *bond* given by a tavern keeper under the act of 1857, prohibiting the keeping of "a gambling table of any description," &c., is broken, where a

Digest.

billiard table is kept for use in such tavern (*People* agt. *Harrison*, ante, 247).

EXECUTION.

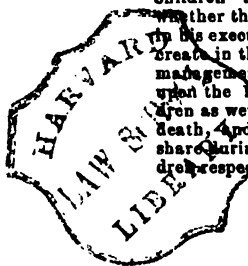
1. Where an execution directed to the sheriff; subscribed by the party issuing it; intelligibly refers to the judgment; states the court and county where the judgment was recovered and transcript filed; names of parties, &c., nothing more is required. The *test* is no necessary part of the execution, nor is the direction to *return*; any errors which may occur in either are immaterial (*Carpenter* agt. *Simmons*, ante, 12).

See DISTRICT COURTS, 2, 3, 4.

SEE CREDITOR'S SUIT, 7, 8.

EXECUTORS AND ADMINISTRATORS.

1. Where an administrator has been removed on the application of his sureties, after filing his account, and another administrator appointed in his place, the latter administrator cannot bring an action upon the bond of the former in his *own name* under the Code, as the real party in interest, to compel payment over of the funds belonging to the estate in his hands. The action on the bond should be prosecuted in the name of the *people* (*Annett* agt. *Kerr*, ante, 324).
2. The surrogate's decrees directing the assignment of the bond to the new administrator for the purpose of such prosecution, is without jurisdiction and void (*Id*).
3. Where executors are authorized by the will to sell, lease, receive rents, repair, and in case of loss or damage by fire, to apply the insurance money to rebuilding, these duties can be performed as a power in trust merely, without taking any estate in the lands (*Martin* agt. *Martin*, ante, 385).
4. Where by the terms of the will the testator's whole estate passed to his children at his death, therefore, whether the testator intended to vest in the executors the estate in trust, or create in them a power in trust for its management, it would operate only upon the shares of such of his children as were infants at the time of his death, and continue only as to each share during the infancy of the children respectively. It would be inconsistent with this provision to hold that the title to any part of the estate vested in the trustees, and equally inconsistent with their rights as owners, for the executors to exercise a power to sell, &c., after the children had reached their majority, except for the purpose of paying debts (*Id*).
5. The administrator of an insolvent estate has an insurable interest in buildings belonging to it (*Herkimer* agt. *Rice*, N. Y. R. 163).
6. The right of creditors to resort to a sale of real estate of the decedent for the payment of debts gives them such an interest therein as to support an insurance, and when made by the administrator it is for their benefit, so far as required to pay the debts of the same (*Id*).
7. If the insurance moneys exceed the amount of the debts, the administrator holds them, *it seems*, in trust for the heirs (*Id*).
8. The renewal of a fire policy held to be made by and with the administrator, and not by the heirs, where the premium was paid by the direction of the administrator and by his agent, who was also the guardian of the heirs; the renewal receipt stating the money to have been received "from the estate" of the decedent, and the guardian, who had sufficient funds both of the administrator and of the heirs, having paid the premium out of the latter, and charged it to the heirs in his accounts (*Id*).
9. Where the insurance is effected by the heirs after the death of their ancestor, it is, *it seems*, for their benefit solely, notwithstanding the defeasible nature of their estate in consequence of its liability to sale for the ancestor's debts: *Per DENIO*, Ch. J (*Id*).
10. An administrator who sells effects of his intestate upon credit, cannot relieve himself from accounting for the price by showing that it was greater than their value (*Hasbrouck* agt. *Hasbrouck*, 27, N. Y. R. 182).
11. The administrator sold to a surviving partner the intestate's interest in the partnership, taking such partner's notes for the price, with which price he charged himself in his inventory. *Held*, that the administrator must account for the value estimated, though the surviving partner became insolvent, the notes were never paid, and the partnership interest was of less value than the amount of the notes (*Id*).



Digest.

12. *It seems* that it should be considered settled that an administrator with the will annexed is not authorized by the statute (2 R. S. p. 72, § 22) to execute a power to sell land conferred by the testator upon his executor (*Roome* agt. *Philips*, 27, N. Y. R. 357).

13. *It seems* that the Supreme Court may appoint a trustee to execute the power, but that the heir-at-law is a necessary party to the action or proceeding in which an order for that purpose is made (*Id.*).

14. A power conferred upon an executor to sell real estate on such terms as he might think proper is, *it seems*, inapplicable to land for the sale of which the testator had made an exortory contract and tendered performance in his lifetime (*Id.*).

15. When the administrator with the will annexed had been appointed trustee to execute the power, and asserted the right to execute it in respect to such lands, he ought to join with the heir-at-law in executing a conveyance, in performance of the testator's contract (*Id.*).

See NEXT OF KIN, 1, 2.

See COSTS, 19.

FOREIGN CORPORATIONS.

1. The *place of assessment*, for the purposes of taxation of a *foreign corporation* doing business in this state, is where the operations of the corporation are carried on—not at the residence of the *comptroller* of the state, who has charge of the securities deposited by such corporation under the statute (*British Commercial Life Ins. Co.* agt. *The Commissioners of Taxes* N. Y., ante, 41).

2. *Corporations* are to be included under the general term "*persons*," in regard to their liability to *taxation* in the place where they carry on their business (*Id.*).

3. A *foreign corporation* (British commercial life insurance company,) doing business in this state, is liable to be *taxed upon the bonds of this state*—bonds of the city of Buffalo—deposited with the *comptroller* of this state, under the statute provided for that purpose. Such bonds are included under the term *personal estate* as used in the statute; and they must be considered "*property invested in any*

manner in the business which they carry on," under the statute of 1855 (*Id.*).

FRAUDULENT REPRESENTATIONS.

1. In an action against the defendant for *false and fraudulent representations* made to the plaintiffs of the solvency of a third person, by which the plaintiffs, as alleged, were induced to sell their goods to such person on credit, by reason of which they suffered loss, the defendant's liability depends upon the falsity of his statements and his knowledge thereof, and their effect upon the business dealings of the plaintiffs with the debtor. These are all questions of fact proper for the consideration of a jury (*Von Pouck* agt. *Peyser*, ante, 292).

2. Although it may be that the law will not presume and will not allow a party to claim that representations which are believed and acted on to-day, have a continuing influence for all time, and that there probably must be some *limit*; yet it is difficult, if not impossible to say where the period should be placed. Like all questions of a similar nature, the extent of time to which it is fair to presume or to permit a party to claim that the influences continued their effect, must depend upon the facts and circumstances of each case, and it is for a jury, and not for the court, to ascertain from the evidence and determine such fact.

3. Therefore, the question in this case whether the plaintiffs were influenced in the sales made by them to their debtor in 1860, by representations made to them by the defendant in respect to his solvency in 1858, was one which should have gone to the jury (*Id.*).

See CLAIM AND DELIVERY OF PERSONAL PROPERTY, 1, 2, 3, 4, 5.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 3, 4, 5, 6, 7, 8.

GUARANTY.

1. A *surety*, who guarantees payment "of the interest" on a bond for the payment of money, not containing any agreement to pay interest, is liable for interest after the bond becomes due (*Hamilton* agt. *Van Rensselaer*, ante, 192).

Digest.

GUARDIAN.

1. Where a former guardian receives from his ward a general power of attorney, executed soon after the latter arrives at his majority, and under such power takes possession of the funds of the ward and appropriates them to his own use, he is liable to arrest for not paying over such funds when legally called upon, notwithstanding such guardian produces a letter from his ward written after he became of lawful age, but previous to the execution of the power of attorney, in which he says, "if you want to use any you are at liberty to do so" (*Wheelock* agt. *Stewart*, ante, 89).
2. The power of attorney did not confer the right to use the money, and the defendant was precluded from claiming it under the terms of the previous letter, as the power of attorney had superseded the letter. Besides such contracts between a former guardian and his ward, though made after the latter becomes of lawful age, securing a benefit to the former, are suspicious, and are to be closely scrutinized, and generally disregarded by the courts (*Id.*).

See *INFANTS*, 1, 2, 3, 4.

HABEAS CORPUS.

See *CONSTITUTIONAL LAW*, 1, 2, 3, 4.

INFANTS.

1. The supreme court acquires jurisdiction of proceedings for the sale of the real estate of infants, on their application by their next friend orally. The form of the application is of no consequence if the substance is given. The material question is, did the infants apply by their next friend (*O'Reilly* agt. *King*, ante, 408).
2. The fact that a next friend is a creditor of the infants, does not disqualify him from acting in that capacity, on an application for a sale of their real estate (*Id.*).
3. And where the next friend is described as being the uncle of the infants, and only male relative of full age, he is by such relation a suitable person to apply for a sale of the infants' real estate (*Id.*).
4. An objection that the special guardian of the infants entered into a contract of sale conjointly with the adult own-

ers, and that the deed tendered to the plaintiff, was in like manner executed by the guardian jointly with the other owners, was without foundation. That other parties owning other interests joined in the same contract and deed, could not deprive either instrument of its binding effect upon all concerned (*Id.*).

INJUNCTION.

1. Where an injunction order served, is definite and peremptory, the defendant must obey it, or at once procure an alteration or dissolution of it (under § 324 of the Code). If he fails to do either, an attachment for contempt will issue against him (*McCardel* agt. *Peck*, ante, 120).
2. An injunction should not be granted upon the mere verification of the complaint. Nor upon statements on information and belief, without showing the source of information. It is only where the verification of the complaint is positive that it will suffice as an affidavit (*Hecker* agt. *Mayor, &c.*, of *New York*, ante, 211).
3. An injunction will issue to restrain a defendant from using or running his factory (steam engine for marble work) which he has built closely adjoining the plaintiff's premises, where it is shown that the plaintiff's premises are injured by the vibration of the defendant's building when the machinery is in motion (*McKeon* agt. *Lee*, ante, 238).
4. Where an action is brought to annul and set aside an assignment made for the benefit of creditors, as illegal and void, and an injunction is issued and served upon the defendants, including the assignors and their assignee, commanding the assignee, his agents, servants, attorneys and all persons acting under him, to refrain and desist from disturbing, holding possession of, or interfering in any manner with the property and effects of the assignors, or any part or portion of the same, it is a violation of the injunction and a contempt of the court, for the assignee thereafter to bring actions against the plaintiffs and others to collect choses in action belonging to the assignors (*Smith* agt. *New York Consolidated Stage Co.*, ante, 277).
5. As a general rule, a court of equity will not restrain by injunction, the commission of an ordinary tort or trespass (*Sixth Av. R. R. Co.* agt. *Kerr*, ante, 383).

Digest.

6. The threatened trespass must be such as cannot be compensated in damages at law, or it must be irreparable, to authorize an interference by injunction (*Id.*).
7. A preliminary injunction had been granted to prevent the use of the plaintiff's road, and the defendants instituted legal proceedings to have the amount of compensation for such use ascertained, which were resisted by the plaintiffs (*Id.*).
8. *Held*, that the injunction should be dissolved even though it should be conceded that the threatened use of the plaintiff's road by the defendants would be technically a constantly recurring grievance, or a continuing trespass. At all events the injunction should be refused till the final hearing, when the subject of compensation can be considered (*Id.*).
9. The statutory privilege to use a railroad, it must be presumed, is granted from public motives and for the public good, and the public, therefore, must be presumed to be interested in the speedy and constant exercise of this privilege (*Id.*).
10. An injunction dissolved on the grounds: 1. That the affidavit and papers upon which it was granted were illegible (*Johnson agt. Casey, ante, 492*).
11. 2. That the injunction had not been served on the defendant personally (*Id.*).
12. 3. That the papers had not been filed as required by the rule of court (*Id.*).
13. It is no answer to the application for an injunction, that the wrong complained of is a public nuisance, if it subjects the plaintiff to a special injury, not common to the public (*Milbau agt. Sharp, 27 N. Y. R. 611*).
14. The finding of a fact, that a proposed railroad "will be specially injurious to the property of the plaintiffs, and other property similarly situated," construed as showing a special and direct injury to each of the plaintiffs in severalty, not a remote one, and not merely a common or public nuisance (*Id.*).

See SUMMARY PROCEEDINGS, 1.

See TRADE MARK, 1, 2, 3, 4.

See AFFINITY, 1, 2, 3.

INSURANCE.

1. An application for the insurance against fire of certain engravings, similar in all respects to others on which the insurer had recently issued a policy to the same applicant, was made on Saturday: the parties agreed verbally upon all the terms of such insurance except the rate of premium; the previous insurance was mentioned in the conversation, and the insurer promised to make out a policy and send to the assured on the next Monday morning. *Held*, that a jury might well find a present contract to insure at the former rate of premium, and to furnish the written evidence on Monday, which authorized a recovery for a loss happening on the intervening Sunday (*Audubon agt. Excelsior Ins. Co. 27, N. Y. R. 216*).
2. Evidence that the insurers were unacquainted with the manner in which the building was occupied where the insured property was located is too remote to affect the question whether they made the contract, and immaterial if they actually made it (*Id.*).
3. In determining the question whether the insurer positively undertook to insure, or stated that he would see about it, the jury are authorized to consider the probability of the applicant's being satisfied with the latter answer (*Id.*).
4. When a creditor procures an insurance upon the life of his debtor, his insurable interest continues, although the statute of limitations would have barred his action, if pleaded, before the debtor's death (*Rawls agt. American Mutual Life Ins. Co. 27, N. Y. R. 282*).
5. It seems that the contract of life insurance is not one for indemnity merely, and that if the insured had an interest in the duration of the life when he took the policy, he may recover, though that interest has ceased: *Per WRIGHT, J (Id.)*.
6. Where the insurer pleads the falsity of representations as to the health of the party whose life is insured, evidence is admissible from the plaintiff as to his health prior to the application for the policy (*Id.*).
7. The admission of such party, made after the plaintiff obtained the policy, that his own habits were intemperate, is inadmissible (*Id.*).
8. Proof is inadmissible that a person

Digest.

- addicted to intoxicating drink is not regarded as an insurable subject by persons engaged in the business of life insurance (*Id.*).
9. When a person, who had signed written statements in respect to the health of the party, stated as a witness that he had no recollection of having done so, it is competent for the plaintiff to prove that such statement was read to him, for the purpose of repelling any presumption of fraud in obtaining his statement (*Id.*).
 10. So it is competent to prove by a physician, who made a written statement, the truth of which was in issue, that he made the statement in good faith (*Id.*).
 11. It is not competent to call for the opinion of physicians, who had made statements in respect to the party insured, whether, if they had known that he habitually indulged in intoxicating drink, they would have regarded that practice as impairing his constitution, or of the examining physician, in behalf of the insurers, whether, with like knowledge, he would have regarded the life as healthy and the risk good (*Id.*).
 12. The plaintiff is entitled to give in evidence all the papers on which the insurers acted when they granted the policy (*Id.*).
 13. A statement procured by the insurer in respect to the life insured, from a third party named by the person whose life is insured, but the contents of such statement not known to him or to the plaintiff, and not furnished as a part of the application, is not a warranty (*Id.*).
 14. When all the questions put to the parties desiring the insurance are fully answered, it is not a fraudulent concealment if they omit to state facts, though material to the risk, not called for by any specific or general question (*Id.*).

See EXECUTORS AND ADMINISTRATORS, 5, 6, 7, 8, 9.

INSURANCE COMPANIES.

1. Chapter 412 of 1862, providing for the settlement by a reference of controversies between the receiver of an insolvent mutual insurance company and its members or stockholders, is constitutional (*Smith* agt. *Kimberk*, 27, N. Y. R. 147).
2. Such controversies respecting the adjustment and administration of a quasi trust fund, in which a multitude of persons are concerned as contributors and distributees, have, by the customary law of this State, antecedent to the constitutional provision for preserving trial by jury, been regarded as of equitable and summary cognizance, and are not among the cases in which the trial by jury has been heretofore used so as to be fastened among rights to remain inviolate (*Id.*).
3. To authorize an assessment, and a reference to enforce the same, there must be evidence of losses sustained by the company other than a mere statement thereof in an affidavit of the receiver—such as proof of judgments recovered against the corporation; the presentment and allowance of claims; or other evidence which would conclude the corporation if it continued in business (*Id.*).

INTERPLEADER.

1. An action to recover *wharfage* is an action for a mere *money demand*. And in such an action third persons have no right by which they can ask the court to be made parties for the settlement of a claim of the plaintiff against the defendant, without being asked to be made parties by either the plaintiff or the defendant (*Kelley* agt. *Murray*, ante, 243).
2. Section 122 of the Code is confined to actions for the recovery of real or specific personal property, but not to an action for the recovery of money (*Id.*).
3. Where, immediately after goods have been placed in charge of *common carriers*, for transportation, two different parties, with distinct and separate interests, present themselves as claimants of the goods, one of which brings an action against the carriers, for the recovery of the goods, and the other threatens an action, it is a proper case for a bill of *interpleader* by the defendants under section 122 of the Code (*Schuyler* agt. *Hargous*, ante, 245).
4. Where all the parties in such case consent, the *sheriff* may allow the ship to proceed on her voyage and have the goods sold in a distant port, and the proceeds brought here and deposited in court, which will be a valid protection to the sheriff for the sale of the goods (*Id.*).

Digest.

5. An action for an *interpleader* under the Code, must take the same course and be governed by the same rules which controlled in chancery in such cases. No order granting the relief prayed for can be made until after the defendants have failed either to *demur* or *answer* within the time allowed by the Code for an answer or demurrer to be served (*Washington Life Ins. Co. agt. Lawrence, ante, 435*).

See *BAILEE AND BAILOR*, 1, 2.

JOINDER OF CAUSES OF ACTION.

See *CAUSE OF ACTION*, 1, 2, 3.

JOINT STOCK COMPANIES.

1. An action by a *shareholder of an unincorporated joint stock company* against a defendant as the president and treasurer of the company, to compel an accounting of the whole property, and an investigation into its whole affairs and business, cannot be sustained without making all the shareholders parties; or unless commenced by the plaintiff for the benefit of all others standing in the same situation, as well as for himself (*Warth agt. Radde, ante, 230*).
2. A cause of action against a defendant, under a contract made by him individually, for a specific sum of money, cannot be joined with a cause of action against him as the president or trustee of an association (*Id.*).
3. Neither can the claim against the defendant alone, be united with causes of action against him and others jointly. The causes of action must not only all belong to one of the enumerated classes under section 167, but all must affect all the parties to it (*Id.*).
4. Where several individuals subscribed for the stock of a *steamship company*, which, as alleged, never became legally organized, and the money paid in was all used to build a ship which was intended to be run for the benefit of the company; and where a majority of the subscribers organized a new steamship company, and registered the ship as belonging to it, and the latter company sold the ship and retained the proceeds (*Dygegan agt. Valiente, ante, 346*).
5. *Held*, that the plaintiff, who was a subscriber to the *original company*, but was not included in the new company, was entitled as a stockholder,

or at least as a partner, to an *accounting for the proceeds of the vessel*, from those of his fellow subscribers who had participated in its sale (*Id.*).

See *TRUSTEES*, 1.

JUDGMENT.

1. The court has the power to direct an entry to be made by the clerk on the docket of the judgment "secured by appeal" upon such terms as it may deem fit, and by requiring that an *additional surety* be given, is clearly within the provision of section 282 of the Code (*Beyan agt. Stewart, ante, 6*).
2. The provision of the 59th section of the *district court act* of the city of New York, are *directory merely*. They impose a mere ministerial duty upon the clerks of those courts, the omission to perform which would not invalidate a judgment which had been regularly recovered; although the docket and a transcript is made evidence, there is nothing in the act which makes it the only evidence. And if the clerk should wholly neglect to make up his docket, the plaintiff in any suit or proceeding where it became necessary, could prove by *other evidence* the recovering of his judgment (*Carpenter agt. Simmons, ante, 12*).
3. A motion may be made at a special term to modify a judgment, after final judgment has been entered (*Butler agt. Niles, ante, 181*).
4. The mere oral announcement of "*judgment of affirmance*" by the general term, and the entry of such decision in the minutes of the clerk, is not such a judgment of the general term as will authorize action under it. A formal judgment, which embraces the decision, and which becomes a permanent record of the court, must be entered by the clerk, and such judgment only, *removes the stay of proceedings* from the judgment appealed from (*Bowman agt. Tallman, ante, 481*).
5. Upon a motion by a subsequent judgment creditor to set aside judgments confessed by his debtor under section 383 of the Code, the court may allow an amendment supporting the judgment by the signing and verifying a new statement stating the facts more specifically (*Mitchell agt. Van Buren, 27 N. Y. R. 300*).
6. A statement held sufficient to support a judgment by confession, that "the indebtedness arose on the sale and

Digest.

conveyance by the plaintiff to the defendant of his interest" in certain partnership property, though it did not show how the plaintiff was connected with the firm, or what was his interest, or, otherwise than by the words quoted, that the sum confessed was for the price of the interest sold (*Thompson agt. Van Vechlen*, 27 N. Y. R. 568).

See DISTRICT COURTS, 2, 3, 4.

See REFEREES AND REPORTS, 3, 4.

JURISDICTION.

1. Can this court at a *general term*, in an action which arose in their district, on setting aside a default on appeal in the action, which was taken at a general term of an adjoining district, and directing that the cause be heard on the appeal at the next general term in the *former district*, which motion was opposed, deprive the court in the *latter district* from hearing the appeal, when it is regularly noticed in the *latter court*? (*Brotherson agt. Conalus*, ante, 117.)
2. In other words, does the order of one general term which is granted on opposition, setting aside the default taken at another general term in an adjoining district, where the cause was regularly noticed, and directing the appeal to be heard in the district where the order is made, *per se* stay the hearing of the appeal in the adjoining district? (*Id.*)
3. *Writs of prohibition* are granted by the superior courts of England, and in this state by the supreme court alone, to prevent inferior courts from *exceeding their jurisdiction*, or to prevent the usurpation of jurisdiction. But this court cannot issue the writ to deprive an inferior court of a jurisdiction which the law in its wisdom has thought proper to give it (*People agt. The Court of Common Pleas*, ante, 477).
4. The *court of common pleas* for the city and county of New York is intrusted with equity powers as amply as this court, to entertain jurisdiction of an action to set aside as fraudulent, an assignment for the benefit of creditors, and to enjoin the assignee from holding possession of or interfering with the assigned property and effects (*Id.*).
5. After notice of appeal is served and the proper undertaking perfected, this

court is so far possessed of the cause as to be competent to make any necessary order; *e. g.*, to dismiss the appeal; although the return of the subordinate court has not been filed (*Adams agt Fox*, 27 N. Y. R. 640).

See CONSTITUTIONAL LAW, 1, 2, 3, 4.

See ARREST, 4, 5.

See AFFINITY, 1, 2, 3.

See AFFIDAVITS, 2, 3, 5.

JUSTICES' COURTS.

1. Before a *justice of the peace* is authorized to proceed with the action in which an *attachment* has been issued, it is necessary that he should have the *officer's return* to the attachment, showing a *service of it* in the manner provided for by the statute. It is the only manner in which the justice can acquire *jurisdiction*. The return of the officer is the *evidence* to be furnished to the justice that the statute has been complied with (*Williams agt. Barnaman*, ante, 59).
2. Where the defendant has had no *personal notice* of the suit, by the service of the attachment upon him, it is vitally important that the different steps prescribed by the statute should be accurately followed (*Id.*).
3. Where the return of the constable stated "that a copy of the attachment was left with Barnaman's (defendant's) wife, at Martinsville, as defendant cannot be found in this county," without an inventory, or any statement that the property had been seized under it: *Held*, that the return was so *fatally defective*, as not to afford any protection to the plaintiff in the sale he afterwards made of the property under an execution upon the judgment recovered in that suit (*Id.*).
4. The rule is well settled, that where a statute prescribes a new mode of proceeding, either unknown to the common law, or contrary thereto, the statute, so far at least as those parts of it essential to jurisdiction are concerned, must be not only proved, but shown to have been strictly pursued, or the proceeding will be held a *nullity*. The same rule applies to courts of limited and special jurisdiction, as justices' courts. Nothing is presumed in their favor so far as it respects jurisdiction: and the party seeking to

Digest.

avail himself of their judgments must show affirmatively that they had jurisdiction (*Id.*).

See *APPEAL*, 8, 9.

See *SERVICE*, 1.

LANDLORD AND TENANT.

1. Where a *tenant* holding over, is liable to be *dispossessed* by virtue of a warrant regularly issued against him by an *incoming tenant*, the latter is not liable for assisting at the request of the constable, to remove the goods in a careful and proper manner, although the day may be rainy, and the goods are put out in the rain, and as alleged, suffered injury (*Higgenbotham* agt. *Lovenbein*, ante, 221).
2. A warrant of *dispossession* properly and regularly issued, protects all who act under it, unless they act *wilfully and maliciously*. And the law does not recognize the *state of the weather* in executing such a warrant (*Id.*).
3. Where an *unsafe, dilapidated building* falls and injures the property of another adjoining, the *owner* of such building is liable for such injury, although the building and premises upon which it stood were *leased to a tenant*, reserving rent. Especially is the owner liable where he covenants in the lease to keep the premises in repair (*Bensen* agt. *Suarez*, ante, 511).
4. A *tenant* is in *lawful possession* of premises where he has the actual consent of the lessee and the landlord, although there is a clause in the lease that the lessee shall not under-let without the consent of the *lessor in writing* (*Id.*).

LIEN.

1. A *promise* by the defendants to hold the proceeds of certain goods for the benefit of the plaintiffs, does not give the plaintiffs a specific *lien* on the goods themselves. And if the defendants, instead of selling the goods for cash and remitting the proceeds to the plaintiffs, appropriated them to the payment of their debts, the plaintiffs would have no more right to follow them into the possession of the creditors, than they would have to follow the proceeds in case the defendants sold the goods for cash and appropriated the money to the payment of the same debts. In either case it is alike merely a violation of a prom-

ise, for which they are personally responsible to the plaintiffs (*Gibson* agt. *Stone*, ante, 468).

2. In order to constitute an *equitable assignment* of the goods to the plaintiffs, they must show an *intent* on the part of the defendants to *surrender all control* over the goods (*Id.*).
3. The *lien* acquired by the levy of an *attachment* under the Code, *even on chattels* alleged to have been fraudulently assigned, will not *alone* authorize an action to set aside the assignment as fraudulent, either before or after judgment in the attachment suit (*Mechanics' and Traders' Bank* agt. *Dakin*, ante, 502).
4. Any party having a lien on a chattel may avoid for usury a mortgage claiming priority (*Thompson* agt. *Van Vechten*, 27, N. Y. R. 568).

See *MECHANICS' LIEN*.

See *CREDITOR'S SUIT*, 7, 8.

LIS PENDENS.

1. Where a plaintiff files a *notice of lis pendens* in an attachment suit affecting real estate, it is improper to include therein any real property which the sheriff has *not levied upon* under the attachment. And where such notice includes other premises than those levied upon, it will be held inoperative as to such additional premises (*Fitzgerald* agt. *Blake*, ante, 110).

MANDAMUS.

1. Where an *alternative writ of mandamus* is granted, a return made thereon, and issues of fact joined thereon, the case becomes an *action* under the Code, and is not a special proceeding (*People ex rel. Lunley* agt. *Lewis*, ante, 159).
2. *Costs* in actions of *mandamus* are not affected by the fee bills of 1840, or the Code, and are still to be taxed under the fee bill contained in the Revised Statutes (*Id.*).
3. Where a return has been made to an *alternative writ of mandamus*, and issues are joined thereon, the case becomes an *action* under the Code, as distinguished from a special proceeding (*affirming decision of the general term*, ante, 159) (*Id.* 470).
4. The law requiring the canal contracting board to award contracts for repairs to "the lowest bidder who will give adequate security," and it hav-

Digest.

ing made an award, a lower bidder who has given the security required is not entitled to a mandamus (*People ex rel. Belden agt. The Contracting Board, 27 N. Y. R. 378*).

5. Though the practice of issuing a peremptory mandamus in the first instance is not to be commended, it is within the power of the court; and the objection, that an alternative writ should have first issued, is not available on error (*Id.*).

MARRIED WOMEN.

1. Where the plaintiff, a confectioner, in 1859, at the request of a married woman, whom he knew to have a separate estate, furnished her with articles for a wedding supper on the occasion of the marriage of her daughter, and subsequently she repeatedly promised to pay the debt out of her separate estate: *Held*, that her estate was not liable for the debt (*White agt. Story, ante, 173*).
2. Because, 1st. There was no evidence of an intent to charge her separate estate stated in the contract (*Id.*).
3. 2d. The consideration for the debt did not go to the direct benefit of her separate estate (*SUTHERLAND, J., dissenting*) (*Id.*).
4. Where a married woman by the terms of a trust created for her benefit under a will, is to have the income of a certain fund and real estate during her life, for her sole and separate use, her husband has no vested right to, or interest in the income, or her savings out of the income during her life, although the marriage took place previous to the acts of 1848 and 1849. By such marriage he acquired no vested rights which could not be interfered with or taken away by his wife's will under those acts (*Rieben agt. White, ante, 320*).
5. After the statutes of 1848 and 1849, and independently of ch. 90 of 1860, a married woman might acquire the title to real or personal property by buying the same upon credit, and no interest therein would pass to her husband whether she had antecedently any separate estate or not. If the vendor would take the risk of payment, the transfer was perfect (*Knapp agt. Smith et al. 27 N. Y. R. 277*).
6. Having thus obtained property, she could manage it by the agency of her husband or any other, and hold the profits and increase to her separate use (*Id.*).

7. So held where the wife of an insolvent in 1851 bought cattle which had been his from his assignees, giving her promissory notes for the price, and purchased the farm, for the conveyance of which he had an executory contract, which was abandoned, she mortgaging it as security for the price, and subsequently employing her husband to manage the farm, the case being free from fraud (*Id.*).

8. Evidence by an assumed principal that her husband was acting as her agent, and the inquiry of another witness whether the wife had been in possession of a farm on which she and her husband lived, are not objectionable on the ground of involving legal conclusions (*Id.*).

MASTER AND SERVANT.

1. A master is not liable for injuries to his servant while using machinery in the employment of the master, if the servant has the same means of knowledge of its safety as the master; and at or before the time the accident occurred there was nothing to indicate any danger such as demanded or suggested precautions which were omitted (*Loonam agt. Brockway, ante, 472*).

MECHANIC'S LIEN.

1. An owner of a building who has in good faith paid the contractor in full, according to the terms of his contract, for the erection of such building, is not liable to sub-contractors, laborers or persons furnishing materials, who have filed the necessary notices for the purpose of acquiring liens within the time required by the act of 1854, but after the contractor had been paid in full (*Thompson agt. Yates, ante, 142*).

MORTGAGE.

1. A mortgage, duly recorded, is not void, as to purchasers or creditors, for uncertainty, when, being conditioned to secure liabilities already incurred, it does not specify the amount (*Youngs agt. Wilson, 27 N. Y. R. 351*).

MORTGAGE OF CHATTELS.

1. A chattel mortgage, which, after enumerating the goods mortgaged, contains a clause in the following form, is void as to creditors—to wit: "And also all other goods, chattels, &c., which may be substituted for any similar property now appertaining to

Digest.

- the business of said firm, or belonging to said firm, at said store and shop, or which may be added by way of purchase or exchange, thereto. It being intended and declared that all the property, stock, tools and fixtures, which may at any time form part of and belong to said business of said firm of T— & Co.; at the premises aforesaid, whether the same be now in existence, or hereafter created or acquired, shall be and is included in, covered and conveyed by the foregoing mortgage" (*Carpenter* agt. *Simmons*, ante, 12).
2. A plaintiff in a judgment and execution, who purchases merely the interest of the defendants in the property sold on the execution, is not estopped from questioning the validity of a prior chattel mortgage given by the defendants on such property (*Id.*).
 3. Where the evidence showed that the defendant, the mortgagee in the chattel mortgage, had seized and sold under the mortgage, a considerable amount in value of property by the mortgagors, the defendants in the execution, after the mortgage was made, and which the plaintiff had purchased at the sheriff's sale, and it appearing that the verdict for the plaintiff was for the value of a portion only of the goods taken, without designating what portion, the court would assume that the verdict was for the value of that portion of the goods not covered by the mortgage, and for which the plaintiff was clearly entitled to recover (*Id.*).
 4. The declarations of the parties to the mortgage were not admissible as evidence to sustain the mortgage as against a judgment creditor (*Id.*).
 5. The mortgagee of a chattel may, it seems, purchase at public sale and hold it for his own benefit and free from any equity of redemption. If otherwise, the purchase is good at law, and is in equity not void but voidable only at the election of the mortgagor. The purchase cannot be impeached in a suit to which the mortgagor is not a party (*Olcott* agt. *Tioga Railroad Company*, 27 N. Y. R. 548).
 6. A chattel mortgage is extinguished by payment made, with the mortgagor's money, by one who purchased the chattel at sheriff's sale to aid the debtor in defrauding his creditors (*Thompson* agt. *Van Vechten*, 27 N. Y. R. 568).
 7. Though the purchaser bought on his own credit, an assignment to him of the mortgage is ineffectual to preserve its lien against subsequent existing incumbrances even for money paid out by him to complete the purchase and protect his title to the chattel (*Id.*).
 8. A precedent debt does not qualify the mortgagee of a chattel as one in good faith, under chapter 279 of 1833, so as to entitle him to question a prior mortgage for a default in re-filing it (*Id.*).
 9. A mortgage not filed, of a chattel not delivered, is void as to a creditor at large whose claim accrues while the default in filing continues, though such creditor is not in a position to raise the question until he has obtained judgment or process against the property (*Id.*).
 10. The right to a preference over the unfiled mortgage attaches itself to the debt, and accompanies it when transferred by the negotiation of commercial paper (*Id.*).
 11. Though a mortgagee cannot avail himself of the omission to refile unless he became such during the continuance of the default, it is otherwise of a general creditor, who may take advantage of such omission, though his right accrued previous to the default (*Id.*).
 12. Any party having a lien on a chattel may avoid for usury a mortgage claiming priority (*Id.*).

MOTIONS.

1. *Motions to correct the calendar* at the circuit, should be made on the *first day of* the circuit, which generally occurs on Monday. It is too late to make such motions on Thursday of the first week of the circuit (*Anonymous*, ante, 394).
2. *Motions to vacate process or proceedings for irregularity*, issued or taken in a cause, must be made at the first opportunity after the irregularity is discovered, otherwise the irregularity will be deemed to be waived (*Bowman* agt. *Tallman*, ante, 482).

MUNICIPAL CORPORATIONS.

1. Under the ordinances of the common council of the city of New York, the whole charge and supervision of *cleaning the streets* of the city, whether by contract or otherwise, is delegated to the *city inspector* and his subordinate

Digest.

- officers, to be performed in the mode prescribed by law. He is the general agent of the city, who within the delegated authority is authorized to bind them (*Hecker agt. Mayor, &c., of New York, ante, 211*).
2. Nor is it only in reference to the cleaning of the streets that such power is conferred upon the city inspector. For various purposes he has authority to employ men to work for the corporation, either by contract or by day's work (*Id.*).
 3. All these varied causes of employment within the general scope of his authority, give him the power to employ men for those purposes, and when so employed they become entitled to claim from the city compensation for the services they may render (*Id.*).
 4. The doctrine of ratification applies to municipal corporations as well as to individuals. And where the corporation of the city of New York not only do not deny their liability, but expressly ratify and confirm the acts of the city inspector, and pass resolutions to provide for the payment of the claims of the workmen and laborers employed by him, such claims are valid against the municipal authorities (*Id.*).
 5. The corporation of the city of New York are liable to be sued and to have judgment rendered against them, although no means have been provided by which the liabilities can be discharged (*Id.*).
 6. No act of the legislature appointing commissioners to perform certain duties in and for the city of New York, is binding upon the city, where there is no acceptance of the act by the corporation (*Var. Valkenburgh agt. Mayor, &c., of New York, ante, 239*).
 7. The act of the legislature entitled "an act to provide for compensating parties whose property may be destroyed in consequence of mobs or riots," passed April 13th, 1855, is a valid and constitutional act of legislation (*Darlington agt. Mayor, &c. of New York, ante, 352; Court of Appeals*).
 8. Judgments rendered pursuant to the provisions of that act, for riot damages, have the same force against the property of the city as judgments recovered for any other cause of action (*Id.*).
 9. The property owned by the city corporation is held by it as a public corporation, and is subject to the law-making power of the state vested in the legislature (*Id.*).
 10. A municipal corporation is not liable for negligence in the construction of a public work, although such work was done under a contract duly executed by its proper authorities—and
 11. Unless it affirmatively appears that an owner of real estate in making a contract for the improvement of his property by the erection of new buildings or the alteration of those already erected, has required some improper act to be done, or has omitted some ordinary or proper precaution, he cannot be charged with improper conduct or negligence, and is not liable for the consequences of negligence in the prosecution of the work (*Vas Wert agt. The City of Brooklyn, ante, 451*).
 12. A municipal corporation is not liable for consequences of negligent acts of firemen, or workmen employed by them to erect buildings on property of the city occupied by an engine company. Neither the fire company nor the builders are the agents or employees of the city for such purpose, nor is the city liable for their acts (*Id.*).
 13. The fee of streets acquired by the city of New York under section 118 of the act of 1813 (2 R. L. 409,) is held by it in trust for the public use of all the people of the state, and not as a corporate or municipal property (*People agt. Kerr, 27, N. Y. R. 188*).
 14. Such property being acquired by the exercise of the right of eminent domain, and the trust of the city being *publici juris*, it is under the unqualified control of the legislature, and any appropriation of it to a public use by legislative authority is not a taking of private property so as to require compensation to the city to render it constitutional (*Id.*).
 15. The possibility of reverter to the owners of land abutting upon the street, after its public uses shall have ceased, is not a property constitutionally exempt from unremunerated appropriation at the will of the Government. Its value, if any, is inappreciable (*Id.*).
 16. The construction of a city railroad upon the surface of the street, without change of grade, is an appropriation to public use (*Id.*).
 17. The corporate authorities of the city of New York have no power

Digest.

- to confer upon individuals, by contract for an indefinite period, the franchise of constructing and operating a railroad in the public streets, for their private advantage (*Milbau agt. Sharp, 27, N. Y. R. 611*).
18. The powers of the corporation, in respect to the control and regulation of the streets, are held in trust for the public benefit, and cannot be abrogated nor delegated to private parties (*Id.*).
19. A resolution by the common council, authorizing private persons to construct and operate a railroad upon certain conditions, without limitation as to time, or reserving a power of revocation, is not a license nor an act of municipal legislation merely, but a contract, which, if valid, it could not abrogate (*Id.*).
20. Such a contract, if valid, conveyed, it seems, an immediate freehold interest in the streets, and a right to the exclusive use of the rails to be laid upon them, in perpetuity; and is void because it would deprive the corporation of its power to control and regulate such use (*Id.*).
- See APPEALS, 18, 19.

NEGLECTANCE.

1. It must now be considered as settled in this state that *common carriers* may limit their liability for *negligence* in almost any respect by *express contract*, for such consideration as will be satisfactory to the passenger or freighter, and that such contracts are not against public policy (*Lee agt. Marsh, ante, 275*).
2. Where a common carrier is not liable for the effects of an accident by which a part of his freight of live animals have been killed, he is not liable for the *delivery of the dead animals*, where his contract is to deliver them alive (*Id.*).
3. A *municipal corporation* is not liable for *negligence* in the construction of a public work, although such work was done under a contract duly executed by its proper authorities—and
4. Unless it affirmatively appears that an owner of real estate in making a contract for the improvement of his property by the erection of new buildings or the alteration of those already erected, has required some improper act to be done, or has omitted some ordinary or proper precaution, he cannot be charged with improper con-

duct or negligence, and is not liable for the consequences of negligence in the prosecution of the work (*Van Wert agt. The City of Brooklyn, ante, 457*).

5. A municipal corporation is not liable for the consequences of negligent acts of firemen, or workmen employed by them to erect buildings on property of the city occupied by an engine company. Neither the fire company nor the builders are the agents or employees of the city for such purpose, nor is the city liable for their acts (*Id.*).
6. Where an *unsafe, dilapidated building* falls and injures the property of another adjoining, the *owner* of such building is liable for such injury, although the building and premises upon which it stood were *leased to a tenant*, reserving rent. Especially is the owner liable where he covenants in the lease to keep the premises in repair (*Benson agt. Suarez, ante, 511*).

See MASTER AND SERVANT, 1.

See SHERIFF, 9, 10.

NEW TRIAL.

1. Motion for a new trial on a case, after unconditional judgment—practice stated in a NOTE (*ante, 78*).
2. In this case, this court on appeal from a judgment of the county court containing a case and exceptions, in an action originating in a justice's court, *held*, that it could not set aside the verdict and grant a new trial on the ground that the verdict was against evidence—the motion for a new trial on that ground should first be made in the county court, before appealing to this court (*Whitney agt. Wells, ante, 150*).
3. But this court *reversed* the judgment of the county court, and granted a new trial in that court for an *error in the charge of the county judge* (*Id.*).
4. Where the circuit judge on the rendition of a verdict of the jury for the defendant, on the same day sets it aside and grants a new trial upon his minutes, on the sole ground that the verdict is *against evidence*, it should be *on payment of costs by the plaintiff*, and not that the costs abide the event (*Overing agt. Russell, ante, 151*).
5. The rule is well settled, and the Code has not abrogated it, that a verdict should not be set aside on the sole

Digest.

ground that it is against evidence, except on payment of costs by the party against whom it is rendered (*Id.*).

6. This court on appeal will reverse the decision of a circuit judge setting aside a verdict upon his minutes, on the sole ground that it is against evidence, where they think it is not so decidedly against the weight of evidence as to authorize the judge to set it aside, although if the verdict had been for the other side this court would not have disturbed it upon the evidence (*Id.*).

NEXT OF KIN.

1. The words "next of kin," used *simpliciter* in a deed or will, mean next of kin according to the statute of distributions, including those claiming *per stirpes* or by representation (*Slosson* agt. *Lynch*, ante, 417).
2. (*The English cases of Elmsley* agt. *Young*, 2 *Mylne & Kean*, 780; and *Witty* agt. *Mangler*, 4 *Heaven*, 358, affirmed by the House of Lords, 10 *Clark & Finnelly*, 215, holding that the words "next of kin," used *simpliciter*, are to be taken to mean nearest of kin, disapproved). (*Id.*)

NON-SUIT.

1. A non-suit should not be granted on the ground that the plaintiff's counsel has not stated in his opening sufficient facts to constitute a cause of action (*Stewart* agt. *Hamilton*, ante, 265).
2. The record of a court of general jurisdiction, showing a decision that the plaintiff be non-suited and the action discontinued, establishes no bar to a subsequent suit for the same cause of action (*Audubon* agt. *Excelsior Insurance Company*, 27 *N. Y. R.* 216).
3. The decision in the first action having originally been that the complaint be dismissed, was amended, upon summary application by the plaintiff, so as to provide for a non-suit and discontinuance. The propriety or legality of such amendment is not reviewable upon an appeal taken in the second action, and the amended judgment is the only evidence receivable of the disposition of the former action (*Id.*).

See FRAUDULENT REPRESENTATIONS, 1, 2, 3.

NOTICE.

- See EVIDENCE, 6, 7.
See LIS PENDENS, 1.
See APPEAL, 8, 9.

PARTIES.

1. Where an action is brought by a creditor under an assignment for the benefit of creditors against the assignees and all other creditors who choose to come in and avail themselves of the benefits of the action, and demands judgment that the assignment be reformed and corrected in a particular which is not common to all the creditors, but concerns the plaintiff, and that the assignee be required to account, the complaint is not demurrable for a defect of parties plaintiffs (*Garner* agt. *Wright*, ante, 92).
2. 1st. Because the creditors are not all united in interest in respect to the reformation of the assignment. 2d. They are not all united in interest with the plaintiff in all the relief sought by the complaint, which is a sufficient excuse for not joining them as plaintiffs (*Id.*).
3. The relief claimed in such an action is not inconsistent, and there is really but one cause of action stated, arising out of one transaction (*Id.*).
4. An action by a shareholder of an unincorporated joint stock company against a defendant as the president and treasurer of the company, to compel an accounting of the whole property, and an investigation into its whole affairs and business, cannot be sustained without making all the shareholders parties; or unless commenced by the plaintiff for the benefit of all others standing in the same situation, as well as himself (*Warth* agt. *Radde*, ante, 230).
5. A cause of action against a defendant under a contract made by him individually, for a specific sum of money, cannot be joined with a cause of action against him as the president or trustee of an association (*Id.*).
6. Neither can the claim against the defendant alone be united with causes of action against him and others jointly. The causes of action must not only all belong to one of the enumerated classes under section 167, but all must affect all the parties to it (*Id.*).
7. It is a well settled principle of law, that where a vessel is sailed on shares, (not chartered) all the owners are re-

Digest.

sponsible for her bills, especially where the items of those bills show they were for port charges (*Bassett* agt. *Crowell*, ante, 241).

8. An action to recover *wharfage* is an action for a mere money demand. And in such an action third persons have no right by which they can ask the court to be made parties for the settlement of a claim of the plaintiff against the defendant, without being asked to be made parties by either the plaintiff or the defendant (*Kelsey* agt. *Murray*, ante, 243).

9. Section 122 of the Code is confined to actions for the recovery of real or specific personal property, but not to an action for the recovery of money (*Id.*).

10. In all cases where a party desires to examine his adversary as a witness under section 391 of the Code, the correct practice is to *propose an affidavit* setting forth that the cause is at issue, and that the party desires to examine his adversary as to matters material to the issue, and upon such an affidavit *procure an order* for his examination. A mere notice served upon the party by the adverse party to attend and be examined as a witness, or an ordinary *subpoena* not sufficient (*Norton* agt. *Abbott*, ante, 388).

See SHERIFF, 7.

See INTERPLEADER, 3, 4.

See WITNESS, 2.

See EXECUTORS AND ADMINISTRATORS, 1, 2.

See APPEAL, 11, 12.

See REVIVAL, 1.

PARTITION.

1. In order to preserve the property from serious loss, the court will appoint a receiver during the pendency of an action in partition (*Pignolet* agt. *Bushe*, ante, 9).

PARTNERSHIP.

1. The statute of *New Jersey* in reference to *limited partnerships*, is the same as that of this state (before the amendment of our statute in 1857), respecting the rights of the special partner (*Ward* agt. *Newell*, ante, 102).

2. Where a *special partner*, under a limited partnership formed in *New Jersey*, under the laws of that state,

claims in an action brought here to recover upon promissory notes given to him by the *general partners*, and the referee finds that the notes were given for a good and valuable consideration by the general partners, by their firm name to the plaintiff, their special partner. and he decides that the plaintiff is entitled to judgment, without finding whether the partnership firm was insolvent or not (*Id.*).

3. Held, that this court has a right to look into and ascertain from the whole case whether the firm was insolvent or bankrupt, and on finding that fact in the affirmative, the twenty-third section of our statute (1 R. S. 787, § 23), the same as that of *New Jersey*, is applicable to the case, and defeats the plaintiff's claim (*Id.*).

4. This section of the statute reads as follows: "§ 23. In case of the insolvency or bankruptcy of the partnership no special partner shall, under any circumstances, be allowed to claim as a creditor until the claims of all the other creditors of the partnership shall be satisfied" (*Id.*).

5. Where there is no proof to show that the special partner *intentionally* participated in violating the thirteenth section of the statute (same in *New Jersey*), requiring that the business shall be conducted in the names of the "*general partners*," without the addition of the word "*company*," he is not to be deemed a general partner (*Id.*).

6. Where a partner having disposed of his share of the good will of the establishment, the new firm agree to allow him half yearly, one per cent upon the gross sales of the firm, this percentage does not constitute him a member of the new firm (*Gibson* agt. *Stone*, ante, 468).

See JOINT STOCK COMPANIES, 1, 2, 3, 4, 5.

See EXECUTORS AND ADMINISTRATORS, 10, 11.

PLACE OF TRIAL.

1. The plaintiff has a right to amend his complaint of course, and without costs, changing the place of trial, after the service of the answer (*Stryker* agt. *The N. Y. Exchange Bank*, ante, 20).

PLEDGE.

1. Where a bank takes stock from an individual as a collateral security to the

Digest.

payment of his promissory note, and then sells the stock, and subsequently on the expiration of their charter, they assign all their property and assets for a valuable consideration, to a new and distinct bank formed under another law, the latter assuming specifically certain debts and liabilities as a part of such consideration, the owner of the stock cannot maintain an action against the latter bank for the value of the stock on tendering the amount of the note, where there is no proof that the latter bank ever received any amount sufficient to pay the claim, or any other claims against the old bank (*Hoffman* agt. *Van Nostrand*, ante, 115).

2. Upon the consignment for sale of cotton in store with third parties at New York city, the consignee made an advance of 11½ cents for each pound, to be repaid at a day certain, under an agreement that, should there be a decline in the market price of cotton, the consignor should, on demand, deposit cash sufficient to cover such decline, and if he failed to do so, or to repay the advance at a fixed day, the consignee might sell the cotton at public or private sale, or otherwise, at his option, for the most it would bring. This, if a pledge at all in a legal sense, was a peculiar contract, including more than a pledge, and to be construed upon its own language and circumstances (*Miliken* agt. *Dehon*, 27 N. Y. R. 364).
3. The consignor having failed to make good a decline in the market price of cotton, the consignee was at liberty to sell in the mode usual in the New York market, without giving notice of his intention or of the time or place of sale (*Id*).
4. The consignee is bound to give notice of a decline and make an actual demand for the margin: such demand need not be personal, but may be made of the consignor's clerk, employed by him as his agent in the particular transaction (*Id*).

PRINCIPAL AND AGENT.

1. An action for work, labor and services, done and performed by the plaintiff for the defendants under an agreement made with a *sub-agent* of the defendants, whose acts in such cases to be valid, are subject to the approval of a *general agent* of the defendants, cannot be maintained, where notice has been given to the

plaintiff by the general agent of the disapproval of such contract (*McGovern* agt. *The Western Railroad Company*, ante, 493).

See MARRIED WOMEN, 5, 6, 7, 8.

PROTEST.

1. A single seal appended to a notary's certificate of protest is a sufficient authentication of his certificate beneath the seal, and on the same page, of the service of notice of non-payment (*Olcott* agt. *Tioga Railroad Company*, 27 N. Y. R. 546).

PUBLIC OFFICE.

1. The words, "collectors of tolls on the canals" (1 R. S., p. 229, § 69), are merely descriptive of the officers and their business, and do not refer to their places of residence or the district in which their official business is to be conducted. The statute authorizes the appointment of a collector of canal tolls in the city of New York (*People* agt. *Benton*, 27 N. Y. R. 387).

See QUO WARRANTO.

QUO WARRANTO.

1. Upon the trial of a *quo warranto* to determine the title to an office depending upon a general election, the question is who received the most legal votes (*People ex rel. Smith* agt. *Pease*, 27 N. Y. R. 45).
2. The inspectors of election are not judicial, but administrative officers: their decision is final only as to receiving or rejecting votes; but the question whether a voter was or was not entitled to vote, is open to examination in subsequent proceedings upon any competent evidence (*Id*).
3. It seems that the inspectors have no authority to reject a vote except in the special cases where it is expressly given by the statute, as when the voter refuses to take the oath, or to answer questions, stands convicted of crime, or has made a bet on the election (*Id*).
4. A voter called as a witness may be asked for whom he voted, and, if he declines or is unable to state, circumstantial evidence may be used to ascertain the fact, and he may be asked for whom he intended to vote, as one of the circumstances bearing upon the question (*Id*).

Digest.

5. For the purpose of showing that a person voted, the poll-list kept at the election is admissible, though not signed by the inspectors or clerks, having no heading denoting its character, and never having been filed in the town clerk's office (*Id.*).
6. Where a voter is proved to have been alien born, and there is *prima facie* evidence that he had not become a citizen by naturalization or otherwise, the burden of showing that he has become a citizen is cast on the party desiring to retain the vote; and, in absence of such evidence, the vote is to be disallowed (*Id.*).
7. But where the evidence is only that one had voted and was alien born, the presumption is that he voted legally, and had qualified himself by naturalization (*Id.*).
- face to be the bill of the corporation, and not that of the signer individually (*Id.*).
5. A corporation owning and operating a railroad making a continuous line with that of another corporation may, *it seems*, irrespective of any special provision in its charter, lawfully contract with the latter company for the joint purchase and ownership of locomotives to be used on both roads. If otherwise, the power is implied in a legislative provision for the connection of the first railroad with a point at the further end of the second, "by railroad, canal, or slackwater navigation" (*Id.*).
6. Evidence is admissible in support of the president's authority to draw the bill in question that he had, on various occasions, as well after as before, executed similar bills and notes which had been paid, and the sums thus expended entered into the accounts of the corporation which were before its managers for years without objection (*Id.*).

RAILROADS.

1. The statute requiring railroad corporations to maintain cattle guards at road crossings applies as well to streets which are crossed by railroads in villages as to country highways (*Brace agt. New York Central Railroad Co., 27 N. Y. R. 289*).
2. *It seems*, however, that where a village street crosses a railroad running along another street, the corporation is not to construct cattle guards longitudinally along its track so as to impede the passage along the street crossing it (*Id.*).
3. The president of a railroad corporation was allowed for three years to purchase locomotives, giving bills for them purporting to bind the company, and to run them upon the road, which he managed in his discretion. Afterwards, the directors resumed the charge of the road and of the property thus obtained, and for some years, though they did not settle, did not question, the accounts rendered by the president of these transactions. This acquiescence is such a ratification as to be evidence of the president's original authority to bind the corporation by bills given for the locomotives (*Olcott agt. Tioga Railroad Co. 27 N. Y. R. 546*).
4. A bill dated at the office of the corporation, signed with the name of the president, with the addition of his title of office, abbreviated, and directing the contents to be charged "to motive power and account," purports on its face to be the bill of the corporation, and not that of the signer individually (*Id.*).
5. A coal company indebted to the railroad corporation for freights gave its notes for a less amount, which the latter indorsed and procured to be discounted. There being no evidence that the coal company received the avails of the notes, it is immaterial, in respect to the objection that the notes were indorsed for its accommodation, that it did not appear whether these notes were given to apply on the coal company's indebtedness. If so, the railroad corporation was the owner; if not, the notes were lent for its accommodation (*Id.*).
8. In the absence of an express finding on the point, and if necessary to support the judgment against an objection that it was *ultra vires* for the railroad corporation to borrow notes, it would be assumed that the notes were given to apply on the coal company's indebtedness (*Id.*).
9. The finding of fact, that a proposed railroad "will be specially injurious to the property of the plaintiffs, and other property similarly situated," construed as showing a special and direct injury to each of the plaintiffs in severalty, not a remote one, and not merely a common or public nuisance (*Milhau agt. Sharp, 27 N. Y. R. 611*).

See MUNICIPAL CORPORATIONS, 13, 14, 15, 16.

Digest.

RECEIVER.

1. In order to preserve the property from serious loss, the court will appoint a *receiver* during the pendency of an action in *partition* (*Pignolet agt. Bushe, ante, 9*).
2. A *receiver* in general is not clothed with any right to maintain an action which the parties or the estate which he represents could not maintain. He must show a cause of action existing in those parties, and that by the appointment of the court, lawfully made in a matter where the court had jurisdiction, the power has been conferred on him in his representative capacity as receiver, to prosecute the action (*Coope agt. Bowles ante, 10*).
3. Where a receiver brings an action to set aside an assignment for the benefit of creditors as void, it is not enough to allege in his complaint that he was appointed receiver in supplementary proceedings. The judgment and other facts necessary to maintain supplementary proceedings must be stated. He must state the equity of the parties whose rights under the order of the court appointing him he represents, to maintain such an action (*Id*).
4. A person will not be appointed by the court a *receiver* who by his own acts or the position he occupies, stands in any improper relation to the cause (*Smith agt. N. Y. Consolidated Stage Co. ante, 208*).
5. Nor generally will a person be appointed receiver, if objection be made by either party, where the court has no personal acquaintance with him (*Id*).
6. A *receiver* appointed by the court in an action, can apply to the court *ex parte* for instructions respecting the management of the estate confined to his care; but the better course is to give notice to those interested in the estate (*Smith agt. N. Y. Consolidated Stage Co. ante, 377*).
7. On such an application there seems to be no valid objection that the *attorneys* for the plaintiffs in the action, appears as attorney and counsel for the *receiver* having charge of the defendant's estate. It is only when the receiver is acting *adversely* to one of the parties, that it has ever been supposed there was any impropriety in employing the counsel of the other (*Id*).
8. It is no objection to the court giving instructions to the receiver, that another action is pending in *another court*, wherein the same receiver is appointed, if the appointment in the latter court is in fact *subsequent* to the appointment in the former court; and especially where the action in the latter is considered merely a colorable proceeding (*Id*).
9. The right of the court to authorize a receiver to continue the business of the estate and property with which he is intrusted, is indubitable. But where it appears upon the application of the receiver for instructions, that the moneys arising from the prosecution of the business are insufficient to defray the current expenses, and that there are no other means to do so, the receiver will be directed to sell, and the court can vest him with discretionary power to sell all or any part of the property as he may think best, and either at public or private sale, as he deems most advisable; but all sales to be made on condition of being subject to the approval of the court (*Id*).
10. An order of a judge appointing a receiver is *not appealable*. Neither is the order of a judge substituting one receiver in place of another appealable (*Siney agt. N. Y. Consolidated Stage Co. ante, 481*).

See SUPPLEMENTARY PROCEEDINGS, 2, 3.

REFEREES AND REPORTS.

1. Where there has been no act of either party to delay a *referee* in making his report, and no order of the court *within the sixty days*, for further time, or notice given within that time of a motion of such order, it is the *absolute duty* of the referee to make and deliver his report within that time (*Niles agt. Maynard, ante, 390*).
2. The statute says he *shall* forfeit his fees, and the action *shall* proceed as if no reference had been ordered, and by well settled rules of construction these words are *imperative*. Therefore, where either party, after the sixty days have expired, and no report has been made and delivered, take proceedings in the cause as if no reference had been ordered, and a report is thereafter made and delivered by the referee, it should be *set aside as invalid* (*Id*).
3. Where a referee in his report upon the issues tried before him, omits to state any *findings of fact*, the report and judgment entered thereon, and all

Digest.

subsequent proceedings are *irregular* (*Wright* agt. *Sanders*, ante, 395).

4. And unless the defeated party chooses to waive the irregularity, he is entitled to have the judgment set aside, and to require that the referee in the first instance report the facts and the conclusions of law found by him (*Id.*).

REFERENCE.

1. Both *legal* and *equitable* claims against the estate of a deceased person may be *referred* under the statute (*White* agt. *Story*, ante, 173).
2. When the trial of a cause is moved at the circuit, if the judge is satisfied from an inspection of the *pleadings* that the trial of the issues of fact will require the examination of a long account, or if after a trial of a cause before a jury has been commenced at the circuit, it appears by the *evidence* that the trial will require the examination of such an account, the judge, of his own motion may direct a *reference* of the issues to a referee to hear and determine (*Holmes* agt. *Bennett*, ante, 289).
3. And the court can direct a *reference* of any referable action on the motion of either party, whenever it is satisfied by *legal evidence* (*Id.*).
4. Where the verified *pleadings* used on a *motion* for a reference show that the trial of the issues of fact in the action will probably involve the examination of a long account, the motion will be granted, notwithstanding the (otherwise valid) objection that the *moving affidavit* is made by the *attorney* and not by the party, without any excuse being shown why it was not made by the party (*Id.*).

See REFERENCES AND REPORTS.

See BILL OF PARTICULARS, 2.

RENTS.

1. Where a sheriff *receives rents* from a defendant's real property in an attachment suit, the court pending the litigation, will order the amount thus received to be applied on incumbrances upon the property, where the plaintiff's security is sufficient without it (*Fitzgerald* agt. *Blake*, ante, 109).

RESIDENCE.

1. The residence of an individual banker, doing business under the general bank-

ing law, is, for the purposes of the taxation of his banking capital, in the town or ward specified as the location of his banking office, in the certificate required by the statute (*Miner* agt. *The Village of Fredonia*, 27 N. Y. R. 155).

2. The actual location of his banking office is to be assumed to have been mentioned in the certificate, and, consequently, to be the place of his residence for the purpose of taxation, where the certificate itself is not in evidence (*Id.*).

RETURN.

1. The return of a constable of *personal service* on a summons is *conclusive* of that fact, and cannot be impeached collaterally. (*Following the case of N. Y. & Erie R. R. Co.* agt. *Purdy*, 18 Barb. 574) (*Hubbard* agt. *Chapin*, ante, 407).

REVIVAL.

1. Under section 121 of the Code, the *representatives* of a deceased *sole defendant*, in an action after judgment and pending an appeal thereon, have the right to have themselves made parties to the appeal (*Schuchardt* agt. *Remiers*, ante, 514).
2. Where one of the defendants dies before judgment, the action cannot be revived as a joint one against the survivor and the personal representatives of the deceased, but may, it *seems*, be revived as separate actions (*Union Bank* agt. *Mott*, 27 N. Y. R. 633).
3. Where in such an action, a motion to revive, made with notice to the representative of the deceased party, was denied as to him, the order affects no substantial right of the plaintiff, and is not appealable (*Id.*).

See ABATEMENT.

RIOT ACT.

1. The act of the legislature, entitled "An act to provide for compensating parties whose property may be destroyed in consequence of mobs or riots," passed April 13th, 1855, is a valid and constitutional act of legislation (*Darlington* agt. *Mayor*, &c. of New York, ante, 352).
2. Judgments rendered pursuant to the provisions of that act, for riot damages, have the same force against the

Digest.

property of the city as judgments recovered for any other cause of action (*Id.*).

3. The property owned by the city corporation is held by it as a public corporation, and is subject to the law-making power of the state vested in the legislature (*Id.*).

SALE.

1. Where a sheriff, by virtue of an execution, sells a store of goods which are subject to a chattel mortgage, he sells the equity of redemption of the defendant in the execution. And in a sale of this kind the sheriff must necessarily sell the property in bulk, and will not be permitted to sell it separately in parcels (*Carpenter agt. Simmons, ante, 12*).
2. It seems that no one besides the defendant in the execution, can object to the manner of making the sale of the property by the sheriff (*Id.*).
3. A plaintiff in a judgment and execution, who purchases merely the interest of the defendants in the property sold on the execution, is not estopped from questioning the validity of a prior chattel mortgage given by the defendants on such property (*Id.*).
4. Where the evidence showed that the defendant, the mortgagee in the chattel mortgage, had seized and sold under the mortgage, a considerable amount in value of property by the mortgagors, the defendants in the execution, after the mortgage was made, and which the plaintiff had purchased at the sheriff's sale, and it appearing that the verdict for the plaintiff was for the value of a portion only of the goods taken, without designating what portion, the court would assume that the verdict was for the value of that portion of the goods not covered by the mortgage, and for which the plaintiff was clearly entitled to recover (*Id.*).
5. The declarations of the parties to the mortgage were not admissible as evidence to sustain the mortgage as against a judgment creditor (*Id.*).
6. The court in the exercise of its equity powers will not compel an unwilling purchaser to take a doubtful title (*O'Reilly agt. King, ante, 408*).
7. But at law, where a party seeks to disaffirm and rescind a contract of sale, and to recover back the deposit of his purchase money on the ground of a defective title, he must satisfy the court that the title is absolutely bad, before he can recover. A merely doubtful title will not do (*Id.*).
8. The supreme court acquires jurisdiction of proceedings for the sale of the real estate of infants, on their application by their next friend orally. The form of the application is of no consequence if the substance is given. The material question is, did the infants apply by their next friend (*Id.*).
9. The fact that a next friend is a creditor of the infants, does not disqualify him from acting in that capacity, on an application for a sale of their real estate (*Id.*).
10. And where the next friend is described as being the uncle of the infants, and only male relative of full age, he is by such relation a suitable person to apply for a sale of the infant's real estate (*Id.*).
11. An objection that the special guardian of the infants entered into a contract of sale conjointly with the adult owners, and that the deed tendered to the plaintiff, was in like manner executed by the guardian jointly with the other owners, was without foundation. That other parties owning other interests joined in the same contract and deed, could not deprive either instrument of its binding effect upon all concerned (*Id.*).

See AGREEMENT, 2, 3, 4.

See SALE OF CHATELS, 1, 2, 3, 4, 5, 6, 7, 8.

SALE OF CHATELS.

1. A sale of chattels may be conditional either as to the right of property in them, or as to the possession of them (*Rawls agt. Dasher, ante, 66*).
2. When the right of property passes to the vendee, but not the right to the possession, the possession may be delivered conditionally, so that the vendor can upon the breach of the condition, recover the possession of the chattels, except as against a bona fide purchaser from the vendee (*Id.*).
3. When the right of property is not to vest in him to whom the chattels are delivered, until the price is paid, the owner can reclaim them from a bona fide purchaser of them from him to whom the possession of them was delivered, upon breach of the condition (*Id.*).

Digest.

4. D. had a quantity of corn in store in H.'s elevator at B. G. on Tuesday asked D. the price of the corn. D. said 57 cents a bushel. G. asked when he must have the money. D. said, right along. G. said he would get the corn out by Thursday, and if he did not get it out before, he would pay for it then any way. D. said that would do, and gave G. an order on the elevator to "deliver to G. or order, 4,238 bushels white corn, cargo Poto-mac, subject to my order until paid paid for." G. on the same day presented D.'s order to the elevator, and had the corn shipped on canal boat for N. Y. R. made advances in good faith upon the bill of lading of the corn. Afterwards, and on Thursday, G. failing to pay for the corn, D. purchased the canal boat and recovered the possession of the corn (*Id.*).

5. *Held*, that the title to the corn passed to G.; that the risk of accident to it was upon G. (*Id.*).

6. *Held* also, that R. had to the extent of his advances, a superior right to D. in the corn (*Id.*).

7. In such cases, in order to confer upon *bona fide* purchaser rights superior the vendor, there must be an actual or constructive delivery of the chattel to him (*Id.*).

8. The symbolical delivery of bills of lading and other similar instruments, is a sufficient delivery of the chattel when an actual delivery is impossible (*Steelyards* agt. *Singer*, 2 *Hilton*, 96, *questioned*) (*Id.*).

9. The giving of the *promissory note* of the purchaser of personal property for over \$50, to the vendor for the purchase price thereof, is not a *payment* within the statute of frauds, so as to pass the title to the property to the purchaser (*Ireland* agt. *Johnson*, *ante*, 463).

See ASSIGNMENT, 2, 3.

See CLAIM AND DELIVERY, 6.

SERVICE.

1. The return of a constable of *personal service* on a summons is *conclusive* of that fact, and cannot be impeached collaterally. (*Following the case of N. Y. & Erie R. R. Co.* agt. *Purdy*, 18 *Barb.* 574) (*Hubbard* agt. *Chapin*, *ante*, 407).

SHERIFF.

1. Where a judgment is recovered against a *sheriff* for an escape, and the sheriff has procured a *stay of proceedings* on the judgment under the statute (2 R. S. 436, § 59), until final judgment and execution in an action which he has prosecuted on the bond for the jail limits given to him by the defendant who has escaped, it is not competent to sue the sheriff's *official bond*, to obtain satisfaction of the judgment against him during such stay (*Matter of Chamberlain*, *ante*, 1).

2. Where a sheriff by virtue of an execution, sells a store of goods which are subject to a chattel mortgage, he sells the equity of redemption of the defendant in the execution. And in a sale of this kind the sheriff must necessarily sell the property in bulk, and will not be permitted to sell it separately or in parcels (*Carpenter* agt. *Simmons*, *ante*, 12).

3. It seems that no one besides the defendant in the execution, can object to the manner of making the sale of the property by the sheriff (*Id.*).

4. On the settlement or withdrawal of proceedings on attachment issued under the Code, the sheriff is entitled to an amount at the rate of *poundage* on the levy of an execution (*Muller* agt. *Sautler*, *ante*, 87).

5. Where a sheriff receives rents from a defendant's real property in an attachment suit, the court pending the litigation, will order the amount thus received to be applied on incumbrances upon the property, where the plaintiff's security is sufficient without it (*Fitzgerald* agt. *Blake*, *ante*, 109).

6. It must now be considered as settled by the court of appeals in *Rinckey* agt. *Stryker* (26 *How. Pr. R.* 75), that the title of a sheriff to property seized under an attachment may be maintained against any action brought by the assignees for the benefit of creditors of the defendant in the attachment suit, notwithstanding that no judgment has been recovered in the attachment suit (*Kelly* agt. *Lane*, *ante*, 128).

7. Under section 232 of the Code, a sheriff holding an execution on a judgment in an attachment suit unsatisfied, may maintain an action in his own name as sheriff, to set aside as fraudulent and void an assignment of the judgment debtor's property, which has been converted into money by the

Digest.

assignees and deposited with a banking company so as to create the relation of debtor and creditor between the assignees and the company (SURRELLAND, J., *dissenting*) (*Id.*).

8. If process, by virtue of which a defendant is arrested and imprisoned is void, an action against the sheriff for his escape cannot be supported (Carpenter agt. Willitt, *ante*, 225).

9. Coal on board a vessel was seized by the sheriff in replevin against the master. It was left on the vessel, with the master's consent, in charge of the sheriff's keeper, was sunk and damaged. In an action by the plaintiff in the replevin, who established his title, *held*, that the degree of diligence required of the sheriff was stated favorably enough to the plaintiff by a charge that it was his duty to take such steps to insure the safety of the coal as a careful, prudent man of good sense, well acquainted with the condition of the vessel and her location with regard to exposure to storms, might reasonably be expected to take if the coal belonged to himself (Moore agt. Westervelt, 27 N. Y. R. 234).

10. It seems that the rule as above stated is sufficiently stringent for a case where the sheriff removes the property from the possession of the defendant and takes it entirely under his own charge, and that under the circumstances of this case a lower degree of care, viz., ordinary diligence, is all that is required of the sheriff (*Id.*).

11. The judgment in replevin having been for damages only, and not for the delivery of the property, the sheriff is not liable for such damages by reason of the failure to justify of sureties who, on the arrest of the defendant in replevin, had given an undertaking for the delivery of the property if adjudged, and for the payment of such sum as for any cause might be recovered against such defendant (Gallarati agt. Orser, 27 N. Y. R. 324).

12. To render him liable, there must be a judgment under the execution on which the property might be sought and delivered (*Id.*).

13. One sued for seizing goods under an attachment may defend by proving that a prior sale by the defendant in the attachment to the claimant was made in fraud of creditors (Hall agt. Stryker, 27 N. Y. R. 590).

14. In the affidavit to procure the attachment, it is a sufficient statement

of the applicant's title that he is the owner of the demand against the debtor, "under assignment to F. H.," an assignee of the original creditor (*Id.*).

15. Whether the plaintiff in the action for seizing the goods is at liberty to controvert the indebtedness of the defendant in the attachment suit to the plaintiff therein, *quære* (*Id.*).

16. It seems that, as against third persons, the affidavits on which the attachment issued, if sufficient to give jurisdiction to the officer granting it, establish the character of the plaintiff therein as a creditor, and that it lies upon a claimant of the goods to establish the validity of the transfer to himself (*Id.*).

See SALES, 3, 4, 5.

SLANDER AND LIBEL.

1. The Code has not changed the rule which requires *certainly* and *particularity* in stating the offence charged against a plaintiff in a plea of *justification*, in an action of *slander* or *libel*. The plea or answer must state specifically the offence of which the plaintiff is alleged to have been guilty, giving time, place and circumstances (Billings agt. Waller, *ante*, 97).

SPECIFIC PERFORMANCE.

1. In *California*, where a party enters into a written contract for the payment of a sum of money in *gold coin* of the United States,—such contracts being authorized by a statute of that state, he will be decreed to *specifically perform* such contract, and make payment in gold coin. And it is no defence to an action for such specific performance, that the defendant has, before suit brought, tendered in payment to the full amount of his obligation, United States *legal tender notes* (Carpenter agt. Atherton, *ante*, 303).

2. An *agreement* entered into between the *first* and *second mortgagees* of the same premises, that the first mortgagee should waive his option to claim the whole principal sum due on his mortgage, on default of payment of interest, in consideration that the second mortgagee would—*First*. Pay the interest in arrear. *Second*. Prosecute the foreclosure of the second mortgage to the earliest possible conclusion; and, *Third*. In the event of the second mortgagee buying in his own name or otherwise, at the fore-

Digest.

closure sale, the mortgaged premises, he should reduce the principal sum secured by the first mortgage, by paying on account of the same the sum of \$3,000, is an agreement which entitles the party showing a violation of it by the other, to a decree in a court of equity for a *specific performance*. (*This decision reverses S. C. at special term, 24 How. Pr. R. 231.*) (*Livingston agt. Painter, ante, 517.*)

See APPEAL, 17.

STATUTE OF FRAUDS.

1. The giving of the *promissory note* of the purchaser of personal property for over \$50, to the vendor for the purchase price thereof, is not a *payment* within the statute of frauds, so as to pass the title to the property to the purchaser (*Ireland agt. Johnson, ante, 463*).

STATUTE OF LIMITATIONS.

1. A *general assignment for the benefit of creditors*, is such an *acknowledgment or promise in writing* by the assignor, as under the provisions of the Code, takes a *note* of the assignor, the payment of which is provided for in the assignment, out of the operation of the *statute of limitations* (*Trustees of Kohnstamm agt. Foster, ante, 273*).
2. A *cause of action* in the nature of a *creditor's bill*, does not accrue until after the recovery of judgment and the return of execution unsatisfied, in the common law action. The *statute of limitations*, therefore, is not a bar to such an action until *six years* from the return of such execution (*Eyre agt. Beebe, ante, 333*).
3. Where a creditor procures an insurance upon the life of his debtor, his insurable interest continues, although the statute of limitations would have barred his action, if pleaded before the debtor's death (*Rawls agt. American Mutual Life Insurance Co. 27 N. Y. R. 282*).

STATUTES.

1. The words, "collectors of tolls on the canal" (1 R. S., p. 229, § 69), are merely descriptive of the officers and their business, and do not refer to their places of residence or the district in which their official business is to be conducted. The statute autho-

rizes the appointment of a collector of canal tolls in the city of New York (*People agt. Benton, 27 N. Y. R. 387*).

See CONSTITUTIONAL LAW, 7, 8.

See BANKS, 3, 4.

STAY OF PROCEEDINGS.

1. Where a judgment is recovered against a *sheriff for an escape*, and the sheriff has procured a *stay of proceedings* on the judgment under the statute (2 R. S., 436, § 59), until final judgment and execution in an action which he has prosecuted on the bond for the jail limits given to him by the defendant who has escaped, it is not competent to sue the sheriff's *official bond*, to obtain satisfaction of the judgment against him during such stay (*Matter of Chamberlain, ante, 1*).
2. The mere oral announcement of "*judgment of affirmance*" by the general term, and the entry of such decision in the minutes of the clerk, is not such a judgment of the general term as will authorize action under it. A formal judgment, which embraces the decision, and which becomes a permanent record of the court, must be entered by the clerk, and such judgment only, *removes the stay of proceedings* from the judgment appealed from (*Bowman agt. Tallman, ante, 482*).

See AGREEMENT, 1.

See SUMMARY PROCEEDINGS, 1.

STREETS.

See MUNICIPAL CORPORATIONS, 13, 14, 15, 16.

See RAILROADS, 1, 2.

SUBMISSION OF CONTROVERSY.

1. Legacy to a college, payable in two years, provided within one year it performed certain conditions. The question whether the condition has been performed does not, until the expiration of the two years, raise a controversy capable of being submitted without action, under section 372 of the Code (*Hobart College agt. Fitzhugh, 27 N. Y. R. 130*).
2. The parties asking the court to determine, before the expiration of a year, whether certain admitted facts amounted to a performance of the condition by the legatee, and if not,

Digest.

what further acts were required, no judgment can be given except one dismissing the case (*Id.*).

3. Such a case cannot be entertained as one for the construction of a will, until the expiration of the time for performing the condition, nor without all the parties to be affected, as residuary legatees, next of kin, &c., uniting in the submission (*Id.*).

SUMMARY PROCEEDINGS.

1. A warrant of dispossession, in summary proceedings to recover the possession of land, will be stayed by injunction, where it appears that the defendant in such proceedings had not time to arrive at the court room, before the hearing, after the service of the summons (*Griffith* agt. *Brown*, ante, 4).
2. Where a tenant holding over, is liable to be dispossessed by virtue of a warrant regularly issued against him by an incoming tenant, the latter is not liable for assisting at the request of the constable, to remove the goods in a careful and proper manner, although the day may be rainy, and the goods are put out in the rain, and as alleged, suffered injury (*Higgenbotham* agt. *Louenbein*, ante, 221).
3. A warrant of dispossession properly and regularly issued, protects all who act under it, unless they act wilfully and maliciously. And the law does not recognize the state of the weather in executing such a warrant (*Id.*).

SUMMONS.

1. The return of a constable of personal service on a summons is conclusive of that fact, and cannot be impeached collaterally. (Following the case of *N. Y. & Erie R. R. Co.* agt. *Purdy*, 18 Barb. 574.) (*Hubbard* agt. *Chapin*, ante, 407.)

SUPERVISORS.

1. Upon the principles established by the decisions of the courts of this state, to charge a county with a claim for services rendered or expenses incurred, there must be some statutory authority authorizing the same to be rendered or incurred, or directing the payment thereof, before the board of supervisors can be compelled by man-

damus to audit such claim (*People* agt. *The Supervisors of Albany*, ante, 22).

See ASSIGNMENT OF COUNSEL, 1.

SUPPLEMENTARY PROCEEDINGS.

1. Where a receiver brings an action to set aside an assignment for the benefit of creditors as void, it is not enough to allege in his complaint that he was appointed receiver in supplementary proceedings. The judgment and other facts necessary to maintain supplementary proceedings must be stated. He must state the equity of the parties whose rights under the order of the court appointing him he represents, to maintain such an action (*Coope* agt. *Bowles*, ante, 10).
2. Where pending an action brought by the plaintiff for the conversion of personal property exempt from levy and sale upon execution, a receiver of the plaintiff's property is appointed in proceedings supplementary to execution, the right of action which the plaintiff has in the pending action does not pass to the receiver. The right of action not vesting in the receiver, there is no ground to claim that the judgment thereafter recovered vested in him (*Andrews* agt. *Rowan*, ante, 126).
3. And in case of the appointment of another receiver of the plaintiff, whose appointment would be subsequent to the recovery of the judgment in the pending action, such receiver would not be entitled to the proceeds of the judgment as against the plaintiff (*Id.*).

SURETIES.

1. A surety, who guarantees payment "of the interest" on a bond for the payment of money, not containing any agreement to pay interest, is liable for interest after the bond becomes due (*Hamilton* agt. *Van Rensselaer*, ante, 142).
2. The sureties in an undertaking on appeal from a judgment, in an action against them on the undertaking, are estopped by the recitals in their undertaking from questioning the correctness of the amount of costs in the judgment appealed from (*Levi* agt. *Dorn*, ante, 217).
3. The holders of a promissory note, without the knowledge or consent of the indorser, procured a third person to subscribe it for the purpose of

Digest.

- adding to their security. The subscription was the same in form as if he had been an original maker. This is not such an alteration as to vitiate the note or discharge the indorser (*McCaughey* agt. *Smith*, 27 N. Y. R. 39).
4. The judgment in replevin having been for damages only, and not for the delivery of the property, the sheriff is not liable for such damages by reason of the failure to justify of sureties who, on the arrest of the defendant in replevin, had given an undertaking for the delivery of the property if adjudged, and for the payment of such sum as for any cause might be recovered against such defendant (*Gallarati* agt. *Orser*, 27 N. Y. R. 324).
 5. To render him liable, there must be a judgment under the execution on which the property might be sought and delivered (*Id.*).
- See UNDERTAKING, 1, 2, 3.

TAXES AND ASSESSMENTS.

1. It is settled by the decision of the United States Court in the case of *The People ex rel. Bank of Commerce* agt. *Commissioners of Taxes of New York* (25 How. Pr. R. 9), that stocks of the United States are exempt from state taxation (*British Commercial Life Ins. Co.* agt. *The Commissioners of Taxes*, N. Y., ante, 41).
 2. The place of assessment, for the purposes of taxation of a foreign corporation doing business in this state, is where the operations of the corporation are carried on—not at the residence of the comptroller of the state, who has charge of the securities deposited by such corporation under the statute (*Id.*).
 3. Corporations are to be included under the general term "persons," in regard to their liability to taxation in the place where they carry on their business (*Id.*).
 4. A foreign corporation, (British Commercial Life Insurance Company) doing business in this state, is liable to be taxed upon the bonds of this state—bonds of the city of Buffalo—deposited with the comptroller of this state, under the statute provided for that purpose. Such bonds are included under the term *personal estate* as used in the statute; and they must be considered "property invested in any manner in the business which they carry on," under the statute of 1855 (*Id.*).
 5. The residence of an individual banker, doing business under the general banking law is, for the purposes of the taxation of his banking capital, in the town or ward specified as the location of his banking office, in the certificate required by the statute (*Miner* agt. *Village of Fredonia*, 27 N. Y. R. 155).
 6. The actual location of his banking office is to be assumed to have been mentioned in the certificate, and, consequently, to be the place of his residence for the purpose of taxation, where the certificate itself is not in evidence (*Id.*).
- See CONSTITUTIONAL LAW, 11, 12, 13, 14.
- See APPEAL, 18, 19.

TITLE.

1. Where in an action for trespass on land, the metes and bounds of the premises claimed to be owned by the plaintiff are set out in the complaint, and the defendant, in his answer, admits that the plaintiff is the owner of the premises thus described, but denies that the alleged trespass is upon such premises; the issue on the trial is one of location, depending upon the accuracy of measurement, and does not involve the question of title (*Heintz* agt. *Dellinger*, ante, 39).
2. The court in the exercise of its equity powers will not compel an unwilling purchaser to take a doubtful title (*O'Reilly* agt. *King*, ante, 408).
3. But at law, where a party seeks to disaffirm and rescind a contract of sale, and to recover back the deposit of his purchase money on the ground of a defective title, he must satisfy the court that the title is absolutely bad, before he can recover. A merely doubtful title will not do (*Id.*).
4. An objection that the special guardian of the infants entered into a contract of sale conjointly with the adult owners, and that the deed tendered to the plaintiff was in like manner executed by the guardian jointly with the other owners, was without foundation. That other parties owning other interests joined in the same contract and deed, could not deprive either instrument of its binding effect upon all concerned (*Id.*).

See SHERIFF, 6, 7.

Digest.

TRADE MARK.

1. A party will be restrained by injunction from the continued use of a *trade mark* belonging to another, which he has used under an agreement and with the consent of the owner, and for the benefit of both, after the owner shall withdraw his interest from the business, and claim the use of his trade mark exclusively, unless the party claiming to use it shall show clearly by the agreement that the owner intended to and had forever parted with his right to the use of such trade mark (*McCardel* agt. *Peck*, ante, 120).
2. The court may allow the use of the trade mark to a certain extent in such a case, where apparently it will work no injury or damage to the owner, and would be a serious damage to the other party to restrain its use (*Id.*).
3. A name which is used to designate an article and denote its quality, is never the subject of a *trade mark*, as "Old London Dock Gin" (*Binniger* agt. *Wattles*, ante, 206).
4. But where the name of the manufacturer is appended to such title, and a style of bottle and label which have a general resemblance of form, symbols and accompaniments to those of the plaintiff, calculated to deceive the public, the plaintiff will be protected by injunction from such violation (*Id.*).

TRESPASS.

1. Where in an action for *trespass on land*, the metes and bounds of the premises claimed to be owned by the plaintiff are set out in the complaint, and the defendant, in his answer, admits that the plaintiff is the owner of the premises thus described, but denies that the alleged trespass is upon such premises; the issue of the trial is one of *location*, depending upon the accuracy of measurement, and does not involve the question of title (*Heintz* agt. *Dillinger*, ante, 39).
2. Where a person with a crowd of others enters the premises of another, knowing that admission thereto had been obtained only by an act of violence by another, he enters wilfully, and is liable as a trespasser (*Chandler* agt. *Egan*, ante, 88).

See INJUNCTION, 3, 5, 6, 7, 8, 9.

See CONSTITUTIONAL LAW, 11, 12, 13, 14.

TRIAL.

1. A *term fee* of \$10 is given by the Code (§ 307) for every term when the cause is necessarily on the calendar and is not tried; but when tried no term fee is allowed, but a trial fee instead thereof (*Place* agt. *The Butternuts Woolen and Cotton Manufacturing Company*, ante, 184).
2. When the merits of a cause are brought up, and the cause is placed on the calendar of the court, and the issues, whether of law or of fact, and whether arising on the pleadings or out of subsequent proceedings, are presented to the court, and by the court judicially examined, there is a *trial* within the meaning of the Code (§ 232). (*Id.*)
3. Assuming the court to have the power to order a *bill of particulars* after the issues in the cause have been referred to a referee to hear and determine, it will not be exercised to interrupt a trial actually proceeding before him (*Cadwell* agt. *Goodenough*, ante, 479).

See REFERENCE, 2, 3, 4.

See FRAUDULENT REPRESENTATIONS, 1, 2, 3.

TRUSTEES.

1. The liability, under chapter 40 of 1848, section 12, of a trustee of a manufacturing company, who was in office when default was made in publishing the required annual report, is limited to debts contracted while he remains trustee, and does not include a debt contracted after he ceased to be a trustee, though while the default continued (*Shaler and Hall Quarry Co.* agt. *Bliss*, 27 N. Y. R. 297).

See EXECUTORS AND ADMINISTRATORS.

UNDERTAKING.

1. The court has the power to direct an entry to be made by the clerk on the docket of the judgment "secured by appeal" upon such terms as it may deem fit, and by requiring that an additional surety be given, is clearly within the provision of § 282 of the Code (*Bergen* agt. *Stewart*, ante, 6).
2. The defendants were sureties in the original undertaking, and the plaintiff an additional surety upon the appeal by virtue of an order of the court, *Held*, that the latter thereby assumed an equal responsibility with the former. The plaintiff as well as the defendants

Digest.

were in fact sureties for a principal debtor in relation to one and the same transaction, and the doctrine of *contribution* is clearly applicable to such a case (*Id.*).

3. Therefore, where the plaintiff claimed in his complaint to recover the full amount of the judgment paid by him on appeal, *Held*, that his remedy must be confined to a *proportionate share* against the defendants as his co-sureties (*Id.*).

4. The *sureties* in an undertaking on appeal from a judgment in an action against them on the undertaking, are *estopped* by the recitals in their undertaking from questioning the correctness of the amount of *costs* in the judgment appealed from (*Levi* agt. *Dora*, ante, 217).

USURY.

1. An agreement is not, it seems, necessarily usurious which, providing for the sale of merchandise by a factor on a commission of five per cent in full of all charges except disbursements, also provides a commission of five per cent on advances made by the factor (*Smith* agt. *Marvin*, 27 N. Y. R. 137).

2. Whether the commission on the advances was merely a cover for an usurious charge for forbearance, is a question of fact, to be settled by further evidence; and proof that such a charge was customary with merchants engaged in similar business, though not controlling, is pertinent on the point of its reasonableness (*Id.*).

3. If, however, such charge were usurious, the fact that it had been stated in the accounts between the parties, showing the application thereto as payment of the proceeds of sales of the principal's merchandise, and that such account had been acquiesced in for two years without objection, will preclude the principal from avoiding the contract in a suit to adjust the final balance between himself and the factor on the entire course of dealing prior and subsequent to the rendering such account (*Id.*).

4. Any party having a lien on a chattel may avoid for usury a mortgage claiming priority (*Thompson* agt. *Van Vechten*, 27 N. Y. R. 568).

VENDOR AND VENDEE.

See SALE OF CHATTELS, 1, 2, 3, 4, 5, 6, 7, 8, 9.

WILL.

1. Where *executors* are authorized by the will to sell, lease, receive rents, repair, and in case of loss or damage by fire, to apply the insurance money to rebuilding, these duties can be performed as a power in trust merely, without taking any estate in the lands (*Martin* agt. *Martin*, ante, 385).

2. Where by the terms of the will the testator's whole estate passed to his children at his death, therefore, whether the testator intended to vest in his executors the estate in trust, or to create in them a power in trust for its management, it would operate only upon the shares of such of his children as were infants at the time of his death, and continue only as to each share during the infancy of the children respectively. It would be inconsistent with this provision to hold that the title to any part of the estate vested in the trustees, and equally inconsistent with their rights as owners, for the executors to exercise a power to sell, &c., after the children had reached their majority, except for the purpose of paying debts (*Id.*).

3. Neither habitual intoxication nor the actual stimulus of intoxicating liquors, at the time of executing a will, incapacitates a testator, unless the excitement be such as to disorder his faculties and pervert his judgment (*Peck* agt. *Cory*, 27 N. Y. R. 9).

4. For the purpose of ascertaining the testator's condition, the dispositions of the will may be examined to see, not whether they are in some degree extravagant or unreasonable, but whether they depart so widely from what would be considered natural as to be fairly referable to no other cause than a disordered intellect.

5. The will of a confirmed drunkard established, though executed after a protracted debauch and the testator had drank several times in the course of the day (*Id.*).

6. The attesting witnesses held to have subscribed at the request of the testator, upon evidence that the draftsman of the will had stated to the testator the necessity of having witnesses, and, upon an inquiry as to who should be obtained, calling upon three persons who were within sight and hearing and requesting them to witness R's will—the paper then lying upon the table near which the draftsman and testator stood—and stating in the hearing of all that R. was going to see

Digest.

- and was making his will, and he wished them to witness it (*Id.*).
7. The signature of the testator, or his acknowledgment thereof in the presence of the witnesses, and his publication of the instrument as his will, held to be proved by the attestation clause and the attending circumstances, though after the expiration of two years none of the witnesses could testify that he saw the testator sign or heard him acknowledge his signature, nor could testify that he himself read, or heard read, the attestation clause, which distinctly affirmed the signature and publication in his presence (*Id.*).
 8. Legacy to a college, payable in two years, provided within one year it performed certain conditions. The question whether the condition has been performed does not, until the expiration of the two years, raise a controversy capable of being submitted without action, under section 372 of the Code (*Robert College* agt. *Fitzhugh*, 27 N. Y. R. 130).
 9. The parties asking the court to determine, before the expiration of a year, whether certain admitted facts amounted to a performance of the condition by the legatee, and if not, what further acts were required, no judgment can be given except one dismissing the case (*Id.*).
 10. Such a case cannot be entertained as one for the construction of a will, until the expiration of the time for performing the condition, nor without all the parties to be affected, as residuary legatees, next of kin, &c., uniting in the submission (*Id.*).
- See APPEAL, 11, 12.
- See EXECUTORS AND ADMINISTRATORS.
- See NEXT OF KIN, 1, 2.

WITNESS.

1. Witnesses cannot testify to the value of an article without knowledge of it. Thus, if witnesses testify that they have no personal knowledge of the qualities of a cow, they cannot be permitted to testify as to the value of her use for a given time. Assuming that she was an ordinary cow does not authorize the testimony (*Thorn* agt. *Couchman*, ante, 95).
 2. A party is not entitled to fees as a witness of his adversary, where he succeeds in the action, for testifying in his own behalf, notwithstanding he makes an affidavit that he would not have attended the trial but for the purpose of being such witness. (*The several reported conflicting decisions on this question referred to as irreconcilable*) (*Steers* agt. *Miller*, ante, 265).
 3. In all cases where a party desires to examine his adversary as a witness under section 301 of the Code, the correct practice is to propose an affidavit, setting forth that the cause is at issue, and that the party desires to examine his adversary as to matters material to the issue, and upon such an affidavit procure an order for his examination. A mere notice served upon the party by the adverse party to attend and be examined as a witness, or an ordinary subpoena, not sufficient (*Norton* agt. *Abbott*, ante, 388).
 4. It is inadmissible to discredit a witness by contradicting him in respect to a mere collateral fact, as to which he testified on cross-examination without objection (*Plato* agt. *Reynolds*, 27 N. Y. R. 586).
- See EVIDENCE, 1, 2, 3, 4, 5, 6, 7.

WRIT OF PROHIBITION.

1. Writs of prohibition are granted by the superior courts of England, and in this state, by the supreme court alone, to prevent inferior courts from exceeding their jurisdiction, or to prevent the usurpation of jurisdiction. But this court cannot issue the writ to deprive an inferior court of a jurisdiction which the law in its wisdom has thought proper to give it (*People* agt. *The Court of Common Pleas*, ante, 477).
2. The court of common pleas for the city and county of New York, is intrusted with equity powers as amply as this court, to entertain jurisdiction of an action to set aside as fraudulent an assignment for the benefit of creditors, and to enjoin the assignee from holding possession of or interfering with the assigned property and effects (*Id.*).

INDEX

ABATEMENT.

The personal representatives of a deceased sole defendant may be made parties to an appeal514

ACT OF LEGISLATURE.

Appointing commissioners to perform certain duties in and for the city of New York, not binding on the city unless accepted by the corporation..239

ADMIRALTY.

When libellant has a right to amend his libel, without submitting to the exception.....283

District court of U. S. has jurisdiction in case of a collision out of the district, where the offending vessel is arrested within the district.....283

What allegations in a libel are sufficient to a common intendment.....283

AGREEMENT.

When unlawful but partially executed, will bind the parties.....107

ALIMONY.

When to be allowed in an action for divorce for cruel treatment218

AMENDMENT.

Of course of a complaint, without costs, changing place of trial, may be made after service of answer.....20

APPEAL.

Who is an "adverse party" within the meaning of the Code, upon whom notice of appeal must be served, in an action by executors for the construction of a will 436

Will not lie to the court of appeals from an order of the general term, upon taxation of costs470

The decision of a referee on conflicting evidence of indebtedness, cannot be reviewed in an appellate court.....27

An order made at special term modifying a judgment is not appealable to general term.....181

An order appointing or substituting a receiver is not appealable.....481

Where the representatives of a deceased sole defendant have the right to be made parties to an appeal.....514

ARREST.

When defendant waives his right to object that the affidavits upon which he was arrested were entitled in the cause —when defendant liable to arrest here for fraud in the purchase of property in a foreign country397

The release of a defendant from arrest by the consent of plaintiff's attorney, does not *per se* operate to discharge him from arrest on final process....209

When the retaining of property under a conditional sale does not constitute a conversion which creates a liability to arrest139

ASSIGNMENT.

Verbal and conditional, of a demand arising on contract, when not sufficient as a set-off249

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

Made by a part of the members of a partnership firm, during the absence from the state of the others, cannot be supported unless due authority from, or ratification by the absent members is shown..... 10

When not invalid by reason of interference by the assigner with the assigned property, nor by reason of a provision to pay each individual partner's private debts of unequal amounts....333

When void on its face by reason of improper provisions488

ATTACHMENT

When, where sheriff receives rents of defendant's real property attached, he will be required to apply it upon

Index.

incumbrances upon the property, pending the litigation	108
Notice of <i>lis pendens</i> in attachment suit should only include the real estate at- tached	110
When sheriff in such suit may bring an equitable action in his own name to set aside as fraudulent and void an assignment for the benefit of creditors made by the defendant	123

B.

BILL OF PARTICULARS.

In an action for indebtedness, should state items of demand, when and how it arose, and the sums claimed	100
Will not be ordered after a cause has proceeded to trial	479

C.

CALENDAR.

Motions to correct should be made the first day of the circuit	394
---	-----

CAUSES OF ACTION.

For reforming an assignment for the benefit of creditors, and that the as- signed account, are not inconsistent, ..	92
Against an individual alone, cannot be joined against him and others jointly, ..	230

CHATTEL MORTGAGE.

When void—rights of parties and judg- ment creditors under a sale upon chat- tel mortgage	12
---	----

COMMON CARRIERS.

May limit their liability for negligence in almost any respect by express con- tract	275
--	-----

COMPLAINT.

In action for money alleged to have been lost at play, must be special, and set out the facts which the statute re- quires	100
When allegations in, constitute an action of tort	139

CONSTITUTIONAL LAW.

The 4th and 5th sections of the act of congress, March 3, 1863, relating to <i>habeas corpus</i> , &c., are unconstitu- tional and void	193
--	-----

CONTRACT.

For work and labor made with a sub- agent, whose acts therein are subject to the approval of a general agent of the principal, is not binding upon the principal when the general agent has given notice of his disapproval of such contract	493
--	-----

CURRENCY.

The pound sterling, when to be estimated here at its market value instead of its par value	342
--	-----

CRIMINAL LAW.

When crime of murder committed while act of 1860 in force, the sentence should be under that act, although it was repealed before the sentence pro- nounced upon the prisoner	112
Under the act of 1863, where the supreme court on error, reverse the sentence or judgment alone, without any error in the trial or verdict, the record is to be remitted for a proper judgment, in- stead of a discharge of the prisoner, as heretofore	112
When a legal sentence is made, although under a probable mistake of the judge as to the degree of crime, there is no ground for its reversal	205

COSTS.

Of a new trial, when granted on the ground that the verdict is against evi- dence, should be ordered to be paid by the party against whom the verdict is rendered	151
Of a new trial upon a case, are to be granted as upon an appeal from a judgment	155
Of an action are to be taxed according to the fee bill existing at the time of the verdict or non-suit	155
In actions on mandamus are not affected by the fee bills of 1840 or the Code, and are still to be taxed under the Revised Statutes	159
A county judge has power to tax costs under the old fee bill	159
A motion for re-taxation must be made without delay, and be founded on the papers used before the taxing officer, ..	159
A term fee of \$10 is allowed when the cause is on the calendar and not tried, but when tried it is not allowed ..	184
Where double costs are given by statute, it is unnecessary for an appellate court to mention them in their decision. It	



Index.

is the duty of the clerk to tax them—when term fees properly taxable in the court of appeals.....378
 Term fee of \$10 for calendar court of appeals, are limited to five terms..224
 Witness fees are not allowed to a party testifying in his own behalf.....266
 No more than five term fees can be allowed for putting a cause on the calendar of the court of appeals.....491

COUNSEL FEES.

For defending a criminal, where counsel is assigned by the court—not a county charge22

D.

DISPOSSESSION.

A warrant of dispossession properly and regularly issued, protects all who act under it, unless they act wilfully and maliciously221

DISTRICT COURTS.

Of the city of New York, when no power to issue execution against the person after judgment, and no power to amend their judgments.....225
 59th section N. Y. district court act is directory merely.....12

DIVORCE.

For adultery, when defendant may amend answer by setting up adultery on the part of the plaintiff.....432

E.

EVIDENCE.

What are proper questions to put to witnesses to prove the general price or market value of articles sold within a certain period.....27
 When defendant not allowed to give evidence on his own behalf in reference to transactions had with a deceased person whom the plaintiff represents, 27
 Witnesses cannot testify to the value of an article without knowledge of it..95
 On an issue of fact—where four witnesses testify to the fact one way and two witnesses testify the opposite—the verdict of the jury in accordance with the testimony of the latter witnesses will not be disturbed on appeal merely for irrelevant testimony, &c.....251

EXECUTION.

Upon which an arrest is made, if void, no action for escape against the sheriff can be supported.....225
 Tests and return no necessary part of—errors in are immaterial.....12

EXECUTORS.

Their duties to sell, lease, receive rents, repair, &c., whether they take a power in trust merely under the will, or a vested estate.....385

EXECUTORS AND ADMINISTRATORS.

When an action upon an administrator's bond, who has been removed by his sureties, cannot be maintained by and in the name of a new administrator, 324

EXCISE LAW.

When a bond given by a tavern keeper under the statute, is broken by keeping a billiard table247

F.

FRAUDULENT ASSIGNMENT.

Of a bond and mortgage by a non-resident debtor, does not authorize a judgment creditor to bring an action to set aside the assignment as a fraudulent obstruction to his execution.....502

FRAUDULENT REPRESENTATIONS.

Limit of time to which they operate—falsity of their statements and knowledge thereof—all questions of fact for a jury.....292

G.

GUARANTY.

Of payment of interest on a money bond, by which interest is not payable, is a sufficient guaranty for interest when the bond becomes due.....192

GUARDIAN.

When liable to arrest for using his ward's funds and not paying over on a legal demand89

INJUNCTION.

Should not be granted upon the mere verification of the complaint—when a municipal corporation should not be

Index.

- enjoined from paying laborers who have done work by the authorized agent of the corporation211
- When will issue to restrain the running of machinery to the plaintiff's injury of an adjoining building.....238
- What interference with the assigned property for the benefit of creditors by the assignee, after service of an injunction, amounts to a contempt of court, 277
- As a general rule a court of equity will not restrain by injunction, the commission of an ordinary trespass—when a temporary injunction prohibiting the use of a city railroad will be dissolved, although such use alleged to be a constantly recurring grievance, 332
- Dissolved on the ground: 1st. That the affidavit and papers upon which it was granted were illegible. 2d. That the injunction had not been served on the defendant personally. 3d. That the papers had not been filed, as required by the rule of court.....492
- IRREGULARITY.**
- Motions to vacate process or proceedings for, must be made the first opportunity.....482
- INTERPLEADER.**
- Section 122 of the Code is confined to actions for the recovery of real or specific personal property.....243
- Where two different parties claim goods in the custody of a common carrier, by action, it is a proper case for interpleader by the carrier.....245
- No order for, can be made until after all the defendants have failed either to demur or answer, within the time allowed therefor.....435
- J.**
- JUDGE.**
- What degree of affinity to one of the parties will preclude him from granting an injunction in the action....187
- JUDGMENT.**
- A motion may be made at special term to modify a judgment after final judgment entered.....181
- The amendment of judgment of affirmance by the general term on an appeal and the entry of such decision in the minutes of the clerk, is not such a judgment as removes the stay of proceedings on the appeal.....482
- JURISDICTION.**
- Of one general term to stay the hearing of an appeal properly noticed for another general term in an adjoining district.....117
- What degree of affinity between a judge and a party will preclude the judge from granting an injunction in the action187
- By a justice of the peace in an attachment suit, is not acquired where the return of the constable does not show a service of the attachment in strict conformity to the statute..... 59
- When the N. Y. common pleas is as ample in its equity powers as the supreme court477
- L.**
- LANDLORD AND TENANT.**
- When tenant in lawful possession under a lessee, without a written consent from the lessor.....511
- LIEN.**
- On chattels by the levy of an attachment, will not alone authorize an action to set aside an assignment of such chattels as fraudulent.....502
- M.**
- MANDAMUS.**
- Issues joined on the return of, constitute the case an action, not a special proceeding470
- When issues of fact are joined upon a return to, the case becomes an action, 159
- MARRIED WOMEN.**
- When her income from trust funds under a will may be disposed of by her will, although the marriage took place previous to 1848-9, without infringing any rights of her husband..... 329
- Their separate estate not liable in 1859 upon their contracts, without an intent to charge such an estate stated in the contract, or its consideration went for its direct benefit173

Index.

MASTER AND SERVANT.

When master not liable for injuries to his servant when using machinery in his employ.....472

MECHANICS' LIEN.

When the owner has paid the contractor in full, it is too late to file claims by sub-contractors or material men, to create a lien.....142

MUNICIPAL CORPORATION.

Not liable for negligence in the construction of a public work, although done under a contract duly executed by its proper authorities.....451

N.**NEGLIGENCE.**

Liability of owner of a dilapidated building which falls and injures adjoining property.....511

NEW TRIAL.

Application for, will not be granted on the ground that the verdict is against evidence, in an action appealed from county court, without first moving in the county court for a new trial on that ground. But a new trial in such case will be granted in this court in the first instance for an error in the charge of the court.....150

When supreme court will reverse the decision of the circuit judge setting aside the verdict of a jury on his minutes as against evidence.....151

Motion for, on a case, after unconditional judgment—practice stated in a Note.....78

NEXT OF KIN.

In a deed or will, mean next of kin according to the statute of distributions.....417

NON-SUIT.

Should not be granted on the ground that the opening of counsel does not state a cause of action.....265

NOTICE.

To produce papers in the progress of a trial, need not be in writing.....27

NOTICE OF APPEAL.

Insufficiency of, in justices' court...232

VOL. XXVIII.**O.****OWNERS OF A VESSEL.**

Are all responsible for her bills, when sailed on shares—not chartered...241

P.**PARTIES.**

When a creditor under an assignment for the benefit of creditors may bring an action in his own name to reform the assignment and demand an accounting from the assignee.....92

Who are necessary parties to an action to compel an accounting of an unincorporated joint stock company...230

In an action for a money demand, third persons have no right to ask to be made parties, when not requested by either party.....243

PARTNERSHIP.

A mere right to per centage upon gross receipts does not constitute a partnership.....468

PARTNERSHIP, LIMITED.

Liabilities of the special and general partners under the statute of New Jersey and of this state, where the special partner claims as a general creditor of the firm.....102

PARTITION.

A receiver will be appointed to protect the property from loss, pending the action.....9

PARTY.

To be examined as a witness under section 391 of the Code, by his adversary, is not compelled to testify on a mere notice, or an ordinary subpoena—an order of the court is necessary...388

PROMISE.

When a promise to hold proceeds of goods for the benefit of another does not give the promisee a lien on the goods...468

R.**RECEIVER.**

In supplementary proceedings, who brings an action to set aside an assignment for the benefit of creditors—what

Index.

- he must allege and state to sustain such an action10
- It is the right and duty of the court to give a receiver instructions in reference to proceedings with the estate and property in his hands, when he applies for such instructions.....377
- In supplementary proceedings, when a right of action by the judgment debtor or a judgment under it do not pass to him.....126
- What are sufficient objections to authorize the court to reject persons named for receiver.....208

REFEREE.

- Is bound peremptorily to make his report within sixty days after the cause is submitted to him, where there has been no act of either party to delay him.....390
- An omission of a referee to state any findings of fact in his report, renders the report, judgment, and all subsequent proceedings, irregular.....395

REFERENCE.

- When a reference should be ordered upon the pleadings, &c.....289
- Of legal and equitable claims may be made against the estate of deceased persons.....173

REPLEVIN.

- For goods sold under fraudulent misrepresentations, when the contract is disaffirmed, and what amounts to a sufficient demand either from the purchaser or his assignee.....197

REVIVAL.

- The death of a party in an action cannot change the rights of the other parties; a revival is permitted for the purpose of protecting the interests of the estate of the deceased.....376

RIOT ACT.

- Not unconstitutional—judgments under it have the same force against the property of the city as other judgments—such property is subject to the law making power of the state....352

S.

SALE.

- Of real estate of infants—what proceedings are proper.....408

SALE OF CHATTELS.

- May be conditional either as to the right of property in them, or as to the possession of them.....66
- When, in order to confer upon a bona fide purchaser rights superior to the vendor, there must be an actual or constructive delivery of the chattel to him.....66

SERVICE.

- The return of a constable of "personal service" on a summons is conclusive of that fact, and cannot be impeached collaterally....407

SHERIFF.

- His bond cannot be prosecuted on a judgment against him for an escape, during a stay which he has procured on the judgment to enable him to prosecute the bond given to him for the jail limits by the defendant who escaped.....1
- Entitled to poundage as on the levy of an execution, on the settlement or withdrawal of proceedings on attachment.....87

SLANDER OR LIBEL.

- Plea or answer of justification in action of, requires certainty and particularity same as previous to the Code.....97

SPECIFIC PERFORMANCE.

- Will be decreed in California, of a contract for the payment of a sum of money in gold coin—to be paid in gold coin.....303
- When will be decreed to enforce an agreement between two mortgagees of the same premises that the first mortgage shall be reduced by the second mortgagee, where the first mortgagee consents to a sale of the premises under the second mortgage to the second mortgagee.....317

STATUTE OF FRAUDS.

- The giving of the vendee's promissory note to the vendor, is not a payment within this statute.....463

STATUTE OF LIMITATIONS.

- The general assignment of a debtor for the benefit of creditors, is such an acknowledgment in writing as to take his promissory note assigned, out of the statute of limitations.....273

Index.

As against a creditor's bill, begins to run from the return of execution on the judgment in the common law action 333

STAY OF PROCEEDINGS.

On appeal, is not removed by the announcement of judgment of affirmance by the court and the entry thereof by the clerk in the minutes—a formal judgment must be entered..... 482

STOCK.

Taken as collateral security by a bank, when an action to recover it cannot be maintained against a new bank, the assignee of the old one..... 115

STOCKHOLDER.

Of an unorganized company, who has paid in his money, is entitled to an accounting from a new company formed from a majority of the old members, although he is not a member of the new company 345

SUMMARY PROCEEDINGS.

A warrant of dispossession will be stayed where the defendant had not time to appear before the justice, after service of the summons, to defend the proceedings 4

SURETIES.

On appeal—two on the original undertaking, and a third added by an order of the court subsequently—all held to be equally responsible..... 6

In an undertaking on appeal, are estopped by the recitals in the undertaking from questioning the amount of costs in the judgment appealed from 217

T.

TAXATION.

U. S. stocks are exempt from—where foreign corporations doing business in this state are to be assessed, and their liability to be taxed upon the bonds of this state deposited by them with the comptroller..... 41

TITLE.

To land, when it does not arise in a justice's court, in an action of trespass on land..... 39

The court of equity will not compel an unwilling purchaser to take a doubtful title—at law the party seeking to disaffirm a contract of sale must show that the title is bad..... 408

TRADE MARK.

When the owner will be entitled to an injunction to restrain its use, &c.. 120

When a name used as a trade mark will be protected by injunction..... 206

TRESPASS.

When a person enters a building knowing that a previous entrance had been obtained by violence, he enters willfully, and is liable as a trespasser.. 98

TRIAL.

What is considered the trial of a cause, in reference to a term fee of \$10.. 184

TRUSTEES.

Under a will, when executors take a power in trust merely, and not a vested estate—their powers and duties to sell, lease, receive rents, repair, &c 385

U.

U. S. LEGAL TENDER NOTES.

Will not discharge a liability for the payment of a sum of money in gold coin, by a contract for such payment made in California..... 303

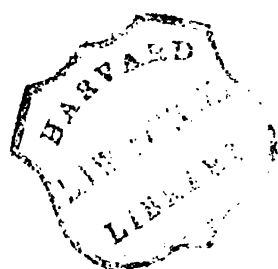
W.

WITNESS FEES.

Not allowed to a party for testifying in his own behalf..... 266

WRIT OF PROHIBITION.

Is granted only to prevent inferior courts from exceeding their jurisdiction, or to prevent the usurpation of jurisdiction..... 477



COURT OF APPEALS.



DECISIONS RENDERED DECEMBER, 1864.

Judgments affirmed with costs.

Darlington agt. The Mayor, &c., of New York (28 How. 352).
Dickens agt. The New York Central Railroad Co (28 Barb. 41).
Carpenter agt. Willetts. (18 How. 400; 28 Id. 225; 28 Id. 376; 6 Bosw. 25.)
Wilckens agt. Willetts; Chapman agt. Brooks.
Richards agt Waring (39 Barb. 42); Graff agt. Bennett (25 How. 470).
Commissioner of Pilots agt. Vanderbilt; Town agt. Thompson; Thurst agt. West.
Lattimer agt. Wheeler (30 Barb. 485); Corning agt. Green (23 Barb. 33).
Rome Exchange Bank agt. Kirkland; Higgins agt. Reynolds.
Main agt. Manchester; In the matter of A. G. Thompson (33 Barb. 334).
Elliott agt. Gibbons (30 Barb. 498).
Penn. Coal Co. agt. Del. & Hudson Canal Co (29 Barb. 598).
Strong agt. Sun Mutual Ins. Co.; Earl agt. Clute, Jr.; Bartlett agt. Tarbox.
King agt. Fitch; Godfrey agt. Johnson; Dodge agt. Gardner; Tuttle agt. Tracey.
Hakes agt. Peck; Metcalf agt. Stryker (31 Barb. 62).
Ganson agt. The City of Buffalo; Scott agt. Rogers; Rogers agt. Woodworth.
Burden agt. De Wolf; Potter agt. Orser. (18 How. 442; 6 Bosw. 123.)
Fish agt. Jacobson (5 Bosw. 514); Truslow agt. Putnam.
Seymour agt. Montgomery; Gould agt. Alken.

Judgment affirmed.

Klein agt. The People.

Judgments affirmed with costs and ten per cent damages.

Bond agt. Willett; Van Mater agt. Hotchkiss; Same agt. Same; Same agt. Same.
Same agt. Same; Marine Bank agt. Clements (6 Barb. 166).

Order of General Term affirmed with costs.

Wolcott agt. Holcomb.

Order appealed from affirmed with costs.

Maltby agt. Green.

Judgments reversed, new trial ordered, costs to abide the event.

Niblo agt. Binsse; Honnegaberger agt. Second Avenue Railroad Co.
Barnes agt. Allen (30 Barb. 663).

Judgment reversed with costs, and judgment for plaintiff on second defence, with directions to New York Common Pleas to proceed and try issue of fact presented by first defence.

Burton agt. Crane.

 Decisions Court Appeals.

Judgment affirmed, except as to costs allowed by General Term to defendants—Ascott Missions—as to those costs judgment reversed. Costs on this appeal to the respondents, American Bible Society, American Tract Society, American Colonization Society, to be paid out of the funds of the estate.

Sherwood agt. American Bible Society, and others.

Order for new trial reversed, and judgment on verdict with costs.

Walker agt. Caywood.

Judgment reversed, and judgment for plaintiff with costs

Gage agt. Brewster (30 Barb. 387).

Judgment of Supreme Court reversed, and judgment of County Court and Justice affirmed with costs.

Rickerson agt. Reader.

Order appealed from reversed with costs.

Genter agt. Fields.

Order granting new trial affirmed, and judgment absolute for defendant with costs.

Seymour agt. Cowing.

Re-arguments affirmed.

Dunlevy agt. Tallmadge; Wright agt. Ames; Braban agt. Hyde (30 Barb. 266).
Harris agt. Rathbun; Levy agt. Levy (40 Barb. 585); Little agt. Denn.

 MARCH TERM, 1865.

Judgment affirmed with costs.

The People agt. Kennedy; Stinson agt. New York Central Railroad.

Sands agt. Campbell; Lounesbery agt. Snyder; Hubbard agt. Briggs.

Blauvelt agt. Woodworth; McWilliams agt. Mason; Matthews agt. Rice.

Salter agt. Ham.

People ex rel. Bartlett agt. Medical Society of Erie (25 Barb. 333).

Smith agt. Beattie; Wood agt. Seeley; Miller agt. Lookwood.

Burns agt. Bryant (27 Barb. 503); Brown agt. Leavitt.

Peterson agt. Chemical Bank (27 How. 491); Cronkhite agt. Wells.

Townsend agt. Stearns.

Mayor of N. Y. agt. Sec. Av. Rail. Co. (31 How. 257; 34 Barb. 41; 12 Abb. 364).

Pettit agt. Shepherd; Demorest agt. Darg (11 Abb. 9); Snipe agt. Eisenltye.

Jackson agt. Roberts; Buel agt. New York Central Railroad.

Bank of Salina agt. Alvord; Boyce agt. Brookway; Smith agt. Paton.

Doolittle agt. Dininny; Patterson agt. Phelps; Moses agt. Bierling.

D'Arrian agt. Mann; Same agt. Mann; De Mainville agt. Mann.

Holmes agt. Carley (32 Barb. 440); Robbins agt. Fitts.

White agt. Nellis (31 Barb. 279); Bakeman agt. Talbot.

Dayton agt. Borst (7 How. 115); Murray agt. Swift; Same agt. Walker.

Murray agt. Lyman; Williams agt. Townsend; Parker agt. City of Syracuse.

Stiles agt. Howland; Scollard agt. Bissell; Miller agt. Wescott.

Decisions Court Appeals.

Orders affirmed with costs.

Underhill agt. Blydenburgh; Same agt. Same; Same agt. Same; Same agt. Same.
Underhill agt. Johnson; Same agt. Same.
People ex rel. Bullard agt. The Contracting Board (20 How. 206; 33 Barb. 510).
Kiby, &c., agt. Fitzgerald; Sands agt. Harvey.

Judgments reversed, new trial ordered, costs to abide the event.

Bell agt. Day; Price agt. The Lyons Bank; Benton agt. Martin.
New York Exchange Company agt. De Wolf; Robert agt. Donnell (10 Abb. 454).
Tobias agt. Ketchum (36 Barb. 304).

Judgments affirmed with costs and damages.

Mead agt. Bunn, 10 per cent.
Field agt. New York Central Railroad, 10 per cent (29 Barb. 176).
Doty agt. Carolus, 10 per cent; Woodruff agt. McGroth, 3 per cent.
Benedict agt. Ocean Insurance Company, 5 per cent.

Judgment affirmed; record remitted to Supreme Court, with direction to Sessions to pass sentence anew.

The People agt. Walters.

Order of General Term reversed, and Surrogate affirmed.

Mount agt. Mitchell.

Order for new trial reversed, and judgment on report of Referee affirmed with costs.

Edmonds agt. Barton.

Judgment reversed and the proceedings remitted to Supreme Court, with directions to dismiss the writ of error.

Weed agt. The People.

Judgment affirmed with costs and modified by striking therefrom the provision as to costs against judgment creditors.

Dimon agt. Hazard.

Order reversed and judgment on verdict affirmed with costs.

East River Bank agt. Hoyt (22 How. 478; 41 Barb. 441).

Judgments of Supreme and County Courts reversed with costs, and judgment of justice affirmed, with order for the restitution of what the plaintiffs have lost by means of the said judgments reversed.

Third Great Western Turnpike Company agt. Loomis.

Judgment reversed, with costs, and judgment for plaintiff, and defendants to have 20 days to answer on payment of costs.

McCarty agt. Bostwick (31 Barb 390).

Judgment of General Term reversed, with costs, as to defendants, Stephen Crocker, and Edward A. Bissel, and that of Special Term affirmed, and judgment affirmed, with costs, as to other defendants—Judge Wright to settle the decree.

Crocker agt. Crocker (17 How. 504).

Order granting a new trial affirmed, and in accordance with plaintiff's stipulation, judgment final for defendants, with costs.

Benedict agt. Huntington.

Decisions Court Appeals.

Judgment affirmed, with deduction of one-third of amount found by referees due to plaintiff, no costs to either party on this appeal.

McDougal agt. Cooper.

Judgment affirmed and record remitted to Supreme Court, with directions to remit same to Kings county Oyer and Terminer, with directions to pass sentence anew.

Kenny agt. The People (27 How. 202).

Judgment reversed, and judgment for plaintiff, on verdict, with costs.

St. John agt. Roberts (6 Bosw. 593).

Judgments of Supreme and County Courts reversed, and judgment of Justice affirmed with costs.

Burnham agt. Butler.

Judgment of Supreme Court and Oyer and Terminer reversed, trial and conviction deemed regular. Record directed to be remitted to Supreme Court, with directions to Oyer and Terminer of Livingston county to sentence prisoner to suffer death, &c., and be confined in state prison at Auburn, at hard labor, until such sentence shall be inflicted.

McKee agt. The People.

Judgment of the Supreme Court affirmed—record to be remitted to that court, to the end that it may be further remitted to the Otsego Oyer and Terminer, with directions to proceed upon the indictment according to law.

Cyphers agt. The People.

[We have been furnished the following case through the courtesy of Judge PEABODY. As there are many of the profession, especially in cities, who have claims to prosecute, and business matters of a legal character to attend to in New Orleans, it is deemed to be of service to give them information respecting the organization and jurisdiction of this court, which the following opinion supplies.]

UNITED STATES PROVISIONAL COURT

FOR THE STATE OF LOUISIANA.

Before the Hon. CHARLES A. PEABODY, Judge

UNITED STATES agt AUGUSTE REITER .

UNITED STATES agt. JOHN LOUIS.

THESE cases were tried on the indictments against the accused before Judge PEABODY and a jury, and were severally convicted ; Reiter of murder, and Louis of arson. After the convictions a motion was made in each case in arrest of judgment.

The motions were heard together for the sake of convenience, and at the request of the counsel for the accused

Ex-Judge WHITTAKER, counsel for Reiter.

Messrs. DURANT & HOMER, counsel for Louis.

Mr. GEO. D. LAMONT, prosecuting attorney of the court, counsel for the Government.

Mr. Whittaker, on behalf of Reiter, made and argued the following points:

First. This court is without jurisdiction, the party charged not being subject to trial except by a court constituted under the laws of Louisiana.

Second. The offence of which he stands convicted is charged to have been committed within this parish, and under the laws and constitution of this state, he could only be tried by the criminal court known as the first district court of New Orleans, which court has since, and at the time of the trial of defendant, existed within this parish and state. (*Sec. 67, Acts of '55.*)

Third. No power exists in any tribunal to suspend the courts of this state. (*Art. 102, Constitution.*)

Fourth. This defendant has, by law, the right of appeal, and he is, by the action of this court, deprived of that right; the judgments and decrees of the provisional court being esteemed to be final and without appeal.

Fifth. For the reasons stated, it is deemed that this court has not jurisdiction either to try this case or to pronounce sentence upon the accused under the laws and constitution of Louisiana.

United States agt. Reiter.

Messrs. Durant & Homer, in behalf of Louis, made and argued the following points:

That the jurisdiction of this hon. court has been made, by the prosecuting attorney, to rest on the following propositions:

That Louisiana seceded from the Union and inaugurated a civil war against the nation. That the national forces subdued the rebellion in a portion of Louisiana in April, 1862, and at a date subsequent to the president's proclamation. That all the inhabitants of the state were enemies, and to be treated as such by all the departments of the federal government, until the executive declares the war at an end. That by the overthrow of the rebellious government, the relations of the people to each other, and their rights of property, remained undisturbed, but that the conquering power, by the laws of war, had authority to make laws, *establish tribunals*, etc., etc., and administer the existing laws so far as the same were not inconsistent with the settled policy of the nation. Hence the establishment of this court by the executive was valid in all respects; and that there was conferred upon it unquestionable authority to administer the criminal law of Louisiana, to try and sentence any prisoner, and to proceed therein as near as possible conformably to her peculiar jurisprudence.

This argument seems to us fully justified on principle and authority.

But a question still remains. Has not the executive, as commander-in-chief of the army and navy, and the head of the war power, sufficiently clearly enunciated the war as at an end, so far as the parishes of this state are concerned in the present proceedings?

He has re-established the national judiciary here. He has permitted, if not sanctioned and approved, the selection of members of congress from Louisiana, who have been received and recognized as such by their own legal judges of election.

He has reorganized civil government here, by his order of major-general commanding, and providing "that when elected, for the time being, and until they are appointed by competent authority," certain state officers "shall constitute the civil government of the state under the constitution and laws of Louisiana." (See the proclamation of 11th January, 1864, issued "in pursuance of authority vested in me by the president of the United States," etc.)

These facts, as influencing or curtailing the jurisdiction of the court, seem to us material and deserving of mature consideration. The national and state tribunals are open; and this, in judgment of law, makes it a time of peace; and in a time of peace the exercise of martial law in point of death is declared murder. (*See the Earl of Lancaster's case, commented on in 1st Hale's Pleas of the Crown, side pages 344 and 499.*)

Now, it is freely admitted by the prosecuting attorney, that the jurisdiction of this court is derived solely from the laws of war. He admits that the defendant here was not tried and convicted (nor could he be) under the laws of the United States; but under the laws and constitution of the state of Louisiana, administered by this court under martial law; Louisiana being still in a state of insurrection, and the president not having yet proclaimed the

United States agt. Reiter.

war at an end. But are these alleged facts actually true? Can the court deny that there is a legally and constitutionally elected governor of Louisiana, when the highest military authority declares the very contradictory of the proposition? And how is the sentence of death to be carried out but in strict conformity to the sec. 80, *et seq.*, of Criminal Proceedings (*Rev. Stat. of La. p. 164*). The case is a very grave one. It involves the life of a human being—a most degraded man, if you will; a creature not far removed from the condition of the beast of burden on the sugar plantation. His chains, in which he was born, have just been struck from his limbs, and his first hour of liberty and manhood are devoted to the commission of a horrid and revolting crime. All the prejudices of race and color are arrayed against him, still, he is a member of the family of man; and though we may neither excuse nor palliate his crime, yet we feel that to hang him is rather to yield to a brutal prejudice than to the dictates of an enlarged humanity.

Mr. George D. Lamont, prosecuting attorney of the court, made and argued the following points:

First. Civil war exists between the people of Louisiana and the government and people of the United States.

Second. The existence of this war has been officially declared by the political department of the general government.

Third. The judicial, and all other departments of the government, and all citizens of the United States, as well as foreign nations, are bound by that declaration.

Fourth. The war having been thus proclaimed, it is not to be considered at an end until the government itself declares that result.

Fifth. The actual occupation of Louisiana by the military forces of the United States engaged in suppressing the rebellion, is accompanied with an authority, by the laws of war and of nations, to institute a temporary provisional civil government for the preservation of order and the enforcement of obligations among the population thus put under the control of the military power.

Sixth. One important and indispensable branch of such civil government is, a judicial system for the conservation of the peace of society, the punishment of crime, and the execution of existing laws.

Seventh. The laws of Louisiana, since its re-conquest from rebel rule, still continue in force, except such ones as are inconsistent with the rights of the United States, or have been modified or suspended for the time being by the occupying power.

Eighth. The military authority of the United States, during the existence of the insurrection and the military occupation of Louisiana, vested in the president as commander-in-chief, is competent, on the theatre of war, to suspend such parts of the local laws as may be found incompatible with the existing state of affairs, or injurious to the success of our arms.

Ninth. The constitution and the laws of Louisiana, her local customs, usages and institutions, must, in the principle of belligerent rights, yield to the superior authority of the law martial, until the war shall be terminated upon her soil.

United States agt. Reiter.

Tenth. The president and his military representatives, subject to his express or implied approval, may put in force this supreme martial law, by military orders issued for the purpose.

Eleventh. Such orders are obligatory, not only on the individuals over whom this military government extends, but upon all municipal authorities persons in office, and courts of justice.

Twelfth. The provisional court of the state of Louisiana, established by order of the president, of the 20th October, 1862, while this state was in insurrection and its people belligerents, and after the federal arms had recovered from the rebel authorities the city of New Orleans and other parts of the state, was justified by the laws of war and of nations, and exercises rightful jurisdiction to the extent of the terms of the order creating it.

Thirteenth. The efforts of the commanding general and of the military governor, with the president's sanction, to invite back the insurgent population to loyalty, as evidenced by the appointment of local judges, the election of several state officers, by such persons as the commanding general deemed safe to intrust with the privileges of voters, the summoning of a convention of delegates to consider of a constitution, afford proof of the desire of the president to mitigate to the greatest possible extent the rigors of a state of war; but they have not yet ripened into a state of peace, nor crushed out the existing rebellion. They combine political statesmanship with military policy, but the military rights continue in full force.

Fourteenth. The same power that called into exercise these auxiliary agencies, is competent, in its discretion, to supersede and disperse them; and should they happen to become an incumbrance to the military power, instead of an advantage, they might all be suspended, including governor, judges and convention.

Fifteenth. The order of Major-General Banks, affirming that the fundamental law of the state is martial law, is a constitutional exposition of the present state of things, and must be so regarded while the war is being waged by the two belligerents within the limits of Louisiana.

OPINION.

By the court, PEARSON, J. These two cases may, without inconvenience or danger of confusion, be considered together, although they have in fact no connection with each other. The same objection to the proceeding of the court to pronounce sentence upon the accused, and in arrest of judgment, is made by both the defendants, and although the objection is urged on different grounds in the two cases, still the objection is proper to be considered on all the grounds in each case. It is urged that this court is not authorized to try these defendants, and that its proceedings have not the sanction of law in the premises. If for any reason this be the case, no further steps should be taken. If for any reason the authority is wanting in one case, it is equally so in the other, and the court should refrain from going further in either case.

United States agt. Reiter.

The accused have been indicted separately and tried separately on charges wholly different and having no connection the one with the other, and the consideration of their cases together, rather than separately, now, is a matter of convenience solely.

One of the accused, Reiter, has been indicted for murder, in causing the death of his wife by violence.

The other has been indicted for arson, in burning a building used as a mansion or dwelling-house.

Each has been tried before a jury of this parish, and been duly convicted of the offence charged in the indictment, and each is now before the court on a motion in arrest of judgment, and in each case the arrest is urged on the ground that the court is not authorized in law and has not jurisdiction to try the case.

The counsel for Reiter claim that the court, in its constitution and creation, had not *originally* the warrant of law to try the accused.

The counsel for Louis concede that the court had authority originally to entertain and try such a case, but insist that for causes occurring *since*, its authority has ceased; that certain steps taken in Louisiana toward the re-establishment of a civil state government have superseded the powers once possessed by the court, and that it is now without jurisdiction or power. The offences of which the defendants stand convicted, by the laws of Louisiana are punishable with death, and nothing would be more agreeable to the court than to proceed with the utmost caution in considering these objections to its jurisdiction.

The accused have been indicted, tried and convicted under and pursuant to the law of the state of Louisiana.

The *first question* to be considered is whether the court has ever had, from the nature of its origin and constitution, authority to try cases like these, and if this question shall be decided in the affirmative, it will remain to examine

The *second question*, namely. whether the power to try or the jurisdiction over such a case, once possessed by this court, has been withdrawn or lost, —whether the court in fact has been in any way deprived of it by subsequent events.

It must be conceded that the court, in its origin and structure, is quite out of the usual course and novel. It has not its origin or foundation in any constitutional or legislative enactment,—is not the creature of any regularly organized constitutional or legislative body. Ordinarily the judicial tribunals of the land are the creations of the legislative departments either of the state or federal government, and for the regularity of their creation and the character and extent of their powers depend on the action of the legislative branch of the one or the other of these powers. In such cases, the first thing to be done in ascertaining the legality or powers of a court, is to consult the constitution and legislation of the government from which it claims to hold commission, and in the letter of these is found the act of its creation and the extent and limit of its powers.

Not so with this provisional court, which depends for its existence on the

United States agt. Reiter.

law of nations, and on that part of the law of nations relating to war—the law by which parties and neutrals are guided in their treatment of each other in a state of war; and that portion of it which relates to and determines the rights and duties of a belligerent, a conqueror in the territory of an enemy and holding it in armed occupation. On that law must depend the decision of the question presented by this motion, of the validity in law and the powers of this court

On that law alone must this court rely for the power and jurisdiction it has exercised for a considerable time, in a large number of cases involving amounts usually very large.

It was in that law that the president of the United States, pressed by the urgent wants of the community here, found his warrant for the establishment of this court in the midst of the country of an enemy held by him *jure belli* in armed belligerent occupation.

The authority of this court is derived from the president of the United States, the chief executive of the nation, and commander-in-chief of its forces, military and naval. It is conferred by an order, of which the following is a copy:

“EXECUTIVE ORDER,
“*Establishing a Provisional Court in Louisiana.*

“EXECUTIVE MANSION.
WASHINGTON, October 20, 1862. }

“The insurrection which has for some time prevailed in several of the states of this union, including Louisiana, having temporarily subverted and swept away the civil institution of that state, including the judiciary and the judicial authorities of the union, so that it has become necessary to hold the state in military occupation; and it being indispensably necessary that there shall be some judicial tribunal existing there capable of administering justice, I have, therefore, thought it proper to appoint, and I do hereby constitute a provisional court, which shall be a court of record for the state of Louisiana, and I do hereby appoint Charles A. Peabody, of New York, to be provisional judge to hold said court, with authority to hear, try and determine, all causes, civil and criminal, including causes in law, equity, revenue and admiralty, and particularly all such powers and jurisdiction as belong to the district and circuit courts of the United States, conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana, his judgment to be final and conclusive. And I do hereby authorize and empower the said judge to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a prosecuting attorney, marshal, and clerk of the said court, who shall perform the functions of attorney, marshal and clerk, according to such proceedings and practice as before mentioned, and such rules and regulations as may be made and established by said judge.

“These appointments are to continue during the pleasure of the president, not extending beyond the military occupation of the city of New Orleans,

United States agt. Reiter.

or the restoration of the civil authority in that city and in the state of Louisiana. These officers shall be paid out of the contingent fund of the war department, compensation as follows: * * * "Such compensations to be certified by the secretary of war. A copy of this order, certified by the secretary of war, and delivered to such judge, shall be deemed and held to be a sufficient commission. Let the seal of the United States be hereunto affixed.

"ABRAHAM LINCOLN.

"By the President:

WILLIAM H. SEWARD, *Secretary of State*."

"WAR DEPARTMENT,
WASHINGTON, 23d October, 1862. }

"I hereby certify that the foregoing is a true copy, duly examined and compared with the original of the executive order of the president of the United State. constituting a provisional court for the state of Louisiana.

"Witness my hand and the seal of the war department.

"EDWIN M. STANTON, *Secretary of War*.

"Attest—JOHN POTTS, *Chief Clerk*."

This order, by its terms, no doubt embraces cases like these under consideration, as indeed it does, perhaps, all others which can occur in life, or become the subject of judicial investigation.

The language of the order, "to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue and admiralty," is clear and unquestionable. and embraces this class of cases, with all others of every description.

The president then sought to give power to this court to try and determine cases of this kind, and having made an order to that effect, has given it that power, if he himself had authority to confer it. The only question remaining to be answered on this point, is whether the president had authority to confer such powers and jurisdiction.

The authority of the president of the United States to create this court, and invest it with powers which should embrace these cases, depends, to some extent at least, on the Constitution of the United States, which creates the office exercised by him. and determines its functions. That constitution, article 2, section 1, paragraph 1, declares as follows:

"The executive power shall be vested in a president of the United States of America."

It also provides, article 2, section 2, paragraph 1:

"The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States."

As president, chief executive, and commander-in-chief of the army and navy, he would not ordinarily have power to establish tribunals for the determination of questions civil and criminal, arising in civil life. Was there anything in the condition of affairs existing at the time the order was made which could give him the power to establish them, and if so, what was there in the condition of affairs then existing to give him power in this

United States agt. Reiter.

respect not ordinarily possessed by him as one of the attributes of his office? Between the government of the United States and a people inhabiting a portion of country lying on the Atlantic Ocean and the Gulf of Mexico, and extending north beyond the northern boundary of the territory in question, and embracing within its borders that section of territory theretofore known, and still most conveniently designated as the state of Louisiana, a war had for some time been waged. This fact is notorious, and moreover it is conclusively settled by the president, the ultimate arbiter of the fact, by his proclamation to that effect. As to its existence, therefore, as well as the existence of some other facts to which I shall have occasion to refer, equally well known, no time will be consumed in attempting to prove them, but they will be assumed.

It is a matter of public knowledge and notoriety that this war had been pending, and that the country over which the jurisdiction of this court is in question, and heretofore known, and in the order establishing this court described as the state of Louisiana, had been for many months held and occupied by those people and their forces, military and naval. That it had been for a long time previous to, and also since the commencement of this war, inhabited, cultivated and owned by the same people who had entered into and carried on war with the government of the United States, and that it was still so inhabited by a people whose relations with the government of the United States had for some time been and were still those of enmity.

That it had, in the course of the war, been by force of the arms of the United States, wrested from the enemy, and was at the time the order establishing this court was made, held by the forces of the United States in armed belligerent occupation. That the armed belligerent forces of this enemy of the United States had been, by force of the arms of the United States, expelled from this country, and that they were at the time held out of it by the armed forces of the United States, and that war was still waged between those belligerents.

The civil institutions of the country thus held, including the tribunals for the administration of justice, had been formed and established by the enemy of the conquering power, and were by it administered at the time of the conquest.

These institutions having been formed, established and administered by the government existing previous to and at the time of the conquest confessedly hostile to the government of the United States, were the only institutions found there at the time the military authority of the United States was by force of its arms established there.

By the conquest of the country, in this case as in others, the previously existing government and the power by which it was administered were subverted and swept away, and those of the conquering power were substituted in their places. This is the necessary consequence of a conquest of a country—a transfer of the control, government and sovereignty of it from one party to another. The old power is conquered and extinguished, and the new one of the conqueror is instituted in its place. The old institutions, if not abandoned and extinguished, are at least suspended in their action.

United States agt. Reiter.

They may be transferred to and adopted by the new governing power, and may be used and operated by it, just as an old machine, detached from the power that has usually moved it, and abandoned for use as a whole, may furnish isolated pieces of machinery which can profitably be introduced into a new machine having different qualities, moved by a new and wholly another power, and used to accomplish on the whole, perhaps, purposes quite different. However there may be retained in use by the new governing power some of the features or institutions of the government which has been supplanted, it is nevertheless wholly another government, and derives its life and all its vital qualities from a new source—the new sovereignty installed by the conquest. A conquest necessarily operates the extinguishment of the power of the party conquered in the country which is the subject of conquest, and the establishment there of the power of the conqueror. Without this there is no conquest of a country, and there can be none.

When the power previously dominant in a country has been extinguished by that of another party, and rendered incapable of governing it further, and a new one has been established in its stead, it is both the right and the duty of the party thus coming into power to see to it that a government wholesome and salutary shall be established and administered, and as in such a case there is only one power, that of the new party succeeding, capable of giving and administering the government, it follows that it is the duty as well as the right of that power to do it.

No country can exist without a government of some kind. The rights of the inhabitants must be protected—crime must be restrained and punished—the virtuous must be protected against the vicious—the weak against the strong—order must be preserved, and security to person and estate assured. The party dominant for the time being has the power to do it, and no one else has the power, and it follows from the necessity of the case that he must exercise it.

So the government of the United States having conquered and expelled from the territory of country, theretofore known as the state of Louisiana, the power by which the government of it had been theretofore administered, and having established there its own power, was bound by the laws of war, as well as the dictates of humanity, to give to the territory thus bereft, a government in the place and stead of the one deposed or overthrown, such an one as should reasonably secure the safety and welfare of the people thus reduced to subjection; in some manner not inconsistent, to be sure, with the proper interests of the governing power, and the maintenance of it in its supremacy there.

The power established there was the military power of the United States, and the president of the United States, as we have seen, the commander-in-chief of the forces, military and naval, of the United States, was at the head of that power, and had the right and duty to exercise and direct it. It was incumbent on him, representing for this purpose the sovereignty of the United States, to see that the duty devolving on his government should be properly performed.

United States agt. Reiter.

He acted in obedience to this duty, and in accordance with this right, when he attempted to establish there a judicial tribunal capable of deciding controversies and administering justice.

But how does this question stand on the authority of adjudged cases.

In the case of *Cross et al. agt. Harrison*, in the supreme court of the United States. in 1868, reported in 16 *Howard*, at page 164, the court held that a civil government formed in California under the direction of the president of the United States, as commander-in-chief of the army and navy, shortly after the conquest of the country, and while it was held in military occupation by the forces under him, was an act warranted by the laws of nations, and that the formation of such a civil government was the rightful exercise of a belligerent right over a conquered country.

It appeared that the port of San Francisco had been conquered by the arms of the United States in 1846, and that shortly afterwards, the United States holding military possession of all Upper California, the president authorized the commander of the forces of the United States there, to exercise the belligerent rights of a conqueror, and form a civil government for the conquered territory, with power to impose duties on imports and tonnage, for the support of the government and of the army which held the country as a conquest in possession. This was done, and duties were levied and collected for a time. Afterwards a treaty of peace was made with Mexico, by which Upper California was ceded to the United States.

After this treaty, and after the cession to the United States of the territory, the military governor continued to collect import and tonnage duties as he had done before, but at the rate authorized by acts of congress in other parts of the United States; and for that purpose appointed the defendant in this suit collector there. He, as such collector, without any legislation of congress on the subject, collected those duties to a large amount from the plaintiffs, who sought in that suit to recover them back again. The question presented was, whether the United States, after the cession of this territory to it, and in the absence of any legislation by congress on the subject, had a right by its military governor to collect those duties. The governor, it appeared, collected them of his own motion, and without any instructions on the subject from his government at home. No question of the right of the government to levy duties as it pleased, while the country was held by right of conquest in strictly military occupation, appears to have been made; but the continuance of that right after the treaty of peace, and after the cession of the country to the United States, seems to have been chiefly in question. The court sustained the right in the broadest manner, putting their decision on the ground that the formation of the civil government when it was done, was the lawful exercise of a belligerent right over conquered territory. That that government being in existence when the territory was ceded to the United States, its powers did not cease by reason of the cession of the country to the United States, or of the restoration of peace, and that it was rightfully continued after peace was made with Mexico, until congress should legislate otherwise.

The decision covered the whole ground that the duties were lawfully

United States agt. Reiter.

collected by the civil military governor of California, an instrument of the provisional government of the United States in that country whilst the military occupation was continued; and that it was so afterwards from the ratification of the treaty of peace until the revenue system of the United States was put in practice, under acts of congress passed for that purpose; in effect deciding that the provisional government of the United States there was rightful and legal, and that it continued in force a legal, rightful government through the time the country was held in military occupation, and after that occupation ceased, and that it was, in fact, in force until some other system was provided according to law to supersede it.

For the doctrine that a conqueror in a conquered country may establish a government, and courts for the administration of justice, the case of *Leitensdorfer et al. agt. Webb*, decided by the supreme court of the United States, in 1857, reported in 20 *Howard*, 176, is an authority directly in point. In that case the conduct of the government of the United States by General Kearney, the officer in command of its forces there, was brought in question. It appeared that after the conquest of that country by the arms of the United States, General Kearney, in command of the forces there, established a government and provisional courts for the administration of justice

Those courts, in the case referred to, were adjudged to be legal, and their decisions obligatory as warranted by law. The power to establish the government and the courts was directly in question, and was directly passed upon by the court, and was sustained on the ground of the right of conquest.

In that case, moreover, it appeared that the country conquered was subsequently, by treaty, ceded to the United States, and it was claimed that by the act of cession the rights of the United States to govern the country and enforce the laws made by the provisional government while it was held in military occupation, was terminated.

It was not seriously questioned that the United States might, while it held the country in military occupation, establish and administer a system of government—make laws by which to govern the inhabitants and regulate their rights and intercourse among themselves, and set up courts by which the laws so made should be administered. That right was deemed to be too evident to be seriously questioned. It was, however, in issue, and was necessarily passed upon by the court. The doctrine chiefly contended for, was that by the cession of the country to the United States, the right to govern it by that provisional system adopted when it was held a conquest of arms, was terminated, and that the United States had, after the cession, only the right to govern it like other territory of the United States, by laws emanating from congress—the constitutional law-making power of its own government—enacted in reference to it as territory of the United States.

This position was not sustained by the court, but was overruled and adjudged not warranted in law.

The court say: "Of the validity of these ordinances of that provisional government there is made no question with respect to the period during which the territory was held by the United States, as occupying conqueror,

United States agt. Reiter.

and it would seem to admit of no doubt, that during the period of their valid existence and operation, these ordinances must have displaced and superseded every previous institution of the vanquished or deposed political power which was incompatible with them. But it has been contended, that whatever might have been the rights of the occupying conqueror, *as such*, these were all terminated by the termination of the belligerent attitude of the parties, and that with the close of the contest, every institution which had been overthrown or suspended would be revived and re-established."

"The fallacy of this pretension," the court proceed to say. "is exposed by the fact, that the conquered territory never was relinquished by the conqueror, nor restored to its original condition or allegiance, but was retained by the occupant until possession was matured into absolute, permanent dominion and sovereignty." The court then proceed to decide when the institutions of the provisional government would terminate.

They say: "We conclude, therefore, that the ordinances and institutions of the provisional government could be revoked or modified by the United States alone, either by direct legislation on the part of congress, or that of the territorial government, in the exercise of powers delegated to it by congress." The question there presented was the validity of an ordinance of the territorial government, authorizing attachments of property of debtors, enacted by the provisional government, while the country was held in military occupation, and before the cession of it, but sought to be enforced by the provisional territorial court after the cession of the country to the United States, and after the military occupation had ceased. The court upheld the law in its origin, and also in its continuance in force, and the administration of it by the provisional territorial court after the cession of the country, and after the military occupation had ceased.

In the case of *Jecker agt. Montgomery* (14 How. 498), decided in 1854, the same supreme court of the United States incidentally recognize the legality and powers of those provisional courts, and while deciding that, for reasons peculiar to cases of prize, and not at all applicable to any others, they could not legally act in cases of that class, the court admit their powers and jurisdiction in other cases: making three decisions of the court of last resort of the government of the United States quite in point. Either of these should be sufficient authority for such a principle, if indeed a principle so plainly proper and necessary, can be thought to need authority of precedent at all.

But at the risk of being tedious and doing work of supererogation, which charges I am persuaded might well be maintained against me, I will add to these authorities already commented on, still another one, which has a bearing quite material on this case at more than one point. I mean the case of the *United States agt. Rice* (4 Wheaton, 246). That case, as well as those already cited, decides that by the conquest and military occupation by one nation of a portion of the territory of another, the portion so acquired passes from the operation of the laws and government of the nation to which it had previously belonged, and comes under the laws and government of the nation making the conquest. It also decides that while such

United States agt. Reiter.

territory is held by the conqueror, it is the right of the party so holding it to govern it, and for that purpose to make laws by which to govern it. That while a portion of territory is so held, the laws of the conqueror holding are in force there, and the laws of the party from whom it has been taken are in abeyance not only *de facto* but also *de jure*; that while it is so held, the conqueror has *de jure* as well as *de facto* all the rights of dominion and sovereignty over it, and may exercise them at his pleasure, and that the former sovereign, overcome or expelled, has no rights there, and his laws have no effect there; that acts done there, with the authority of the conqueror, are legal and proper, but those done in violation of his laws, even though done in obedience to the laws of the sovereign expelled, are not legal, but contrary to law. In short, that, by conquest, the sovereignty and right to rule of the conqueror are introduced and established, and the sovereignty and right of rule in the party expelled are extinguished; and that the duty of allegiance in the people remaining there is transferred in like manner from the vanquished to the victorious party; in fact, that by such an act the change of the sovereignty and allegiance is complete, and new rights and duties in both parties are created accordingly. I think that all these conclusions certainly follow from what is decided, if indeed they are not all actually decided there.

That case, like each of the others cited, was decided by the supreme court of the United States—the court of highest human authority on that subject,—and as the decision was against the United States, and in favor of the authority of Great Britain, its enemy in the war, and was made shortly after the occurrence of the war out of which it grew; and while no department of this government was inclined to magnify the rights of Great Britain or disparage those of its own government, there can be no suspicion of bias in the mind of the court in favor of the conclusion at which it arrived, and no doubt that the law seemed to the court to warrant and demand such a decision.

That case grew out of the war of 1812, between the United States and Great Britain. It appeared that in September, 1814, the British forces had taken the port of Castine, in the State of Maine, and held it in military occupation; and that while it was so held, foreign goods, by the laws of the United States subject to duty, had been introduced into that port without paying duties to the United States. At the close of the war the place was by treaty restored to the United States, and after that was done the government of the United States sought to recover from the persons so introducing goods there while in possession of the British, the duties to which, by the laws of the United States, they would have been liable. The claim of the United States was that its laws were properly in force there, although the place was at the time held by the British forces in hostility to the United States, and the laws, therefore, could not at the time be enforced there; and that a court of the United States (the power of that government there having since been restored,) was bound so to decide. But this illusion of the prosecuting officer there was dispelled by the court in the most summary manner. Mr. Justice Story, that great luminary of the American

United States agt. Reiter.

bench, being the organ of the court in delivering its opinion, said: "The single question is whether goods imported into Castine during its occupation by the enemy are liable to the duties imposed by the revenue laws upon goods imported into the United States. * * * *We are all of opinion that the claim for duties cannot be sustained.* * * * The sovereignty of the United States over the territory was of course suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only as it chose to recognize and impose. From the nature of the case no other laws could be obligatory upon them. * * * Castine was, therefore, during this period, as far as respected our revenue laws, to be deemed a foreign port, and the goods imported into it by the inhabitants were subject to such duties only as the British government chose to require. Such goods were in no correct sense imported into the United States." The court then proceed to say, that the case is the same as if the port of Castine had been foreign territory, ceded by treaty to the United States, and the goods had been imported there previous to its cession. In this case they say "there would be no pretence to say that American duties could be demanded; and upon principles of public or municipal law, the cases are not distinguishable." They add, at the conclusion of the opinion, "The authorities cited at the bar would, if there were any doubt, be decisive of the question. *But we think it too clear to require any aid from authority.*" Does this case leave room for a doubt whether a country held as this was in armed belligerent occupation, is to be governed by him who holds it, and by him alone? Does it not so decide in terms as plain as can be stated? It is asserted by the supreme court of the United States *with entire unanimity*, the great and venerated MARSHALL presiding, and the erudite and accomplished STORY delivering the opinion of the court that such is the law, and it is so adjudged in this case. Nay, more: it is even adjudged that no other laws could be obligatory; that such a country, so held, is for the purpose of the application of the law of its former government to be deemed foreign territory, and that goods imported there (and by parity of reasoning other acts done there) are in no correct sense done within the territory of its former sovereign, the United States.

No part of the remarks of the court in this case is more fully warranted or proper than the last, to the effect that *the case is too clear to require aid from authority.*

The right, therefore, of a conqueror in a conquered country to ordain a system of government for it, and among other institutions, to erect courts of justice, and maintain them in the discharge of their proper functions, is as well established and free from doubt when considered on authority, as it is in principle; and about as well in each as any proposition which could find among men an advocate to question it, could in the nature of things be expected to be.

But it may be said that this reasoning, if correct as to territory foreign to

United States agt. Reiter.

the conqueror, and as to which his rights and duties are simply and solely those of a conqueror by force of arms, is not applicable to the case in question, for this Louisiana is a part of the territory of the United States, over which the powers and duties of the president and the other departments of the government were already fixed, and are dependent on the constitution and laws of the United States, and limited to the powers and duties conferred by them; and that those laws do not give the president the power to establish a court like this, and therefore that he has not that power.

It is quite certain that ordinarily he would have no such power; and hence, instead of looking for it to the constitution and laws of the United States alone, I have looked elsewhere and to other facts than his merely occupying the place of president at the time. I have invoked also the fact that he was by virtue of that office, as commander of the forces of the United States, holding in armed belligerent occupation the country in which the court was established, and in which its powers and authority are now brought in question.

Is this country, for the purpose of determining the powers and duties of the commander-in-chief of the army and navy of the United States, to be deemed domestic or is it to be deemed foreign territory?

What are the relations of the forces of the United States, and of their commander, to these districts of country as they enter them, expelling the forces of the enemy?

Is he the chief executive of the country of which these districts are a part, and is he nothing more, and are his powers and duties those of chief executive only?

Has he in this country subjected to his arms, and while in armed belligerent occupation of it with the forces under his command—has he by law the same powers and duties as he would have in Massachusetts or New York in time of profound peace, and has he no others?

Has war given him no powers in law in addition to those possessed by him in time of peace?

Having in war broken down the hostile power of it, and driven its forces out of it by the military force under his command, has he no new powers there by reason of that fact?

When his subordinate officer, Admiral Farragut, landed there from the deck of the *Hartford*, did he carry with him no right to power not commonly enjoyed by the president in other territory of the United States?

Did his rights as conqueror cease the moment his power in that character was established?

Having entered Louisiana as commander-in-chief, at the head of his forces victorious, was he at once remitted to the position, powers, and limited to them?

Had he none of the powers or duties of a conqueror in a country subjected to his arms?

What was this country to do for a government when the old hostile one had been reduced and expelled?

United States agt. Reiter.

Was it to get along without one as best it could? Was it to do this until some new one could spring up to supply the want?

Were all the rights of persons and property, natural and acquired, the right to life, security, liberty and property, to be at once suspended, and was the rule of physical force to override them all?

The right of a conqueror to govern a country held by him by right of conquest, is well established on authority. The cases which establish this right, however, relate to the conquest of a country foreign to the conqueror, and as to which he has no rights and is under no restraints, except those which come from the fact of conquest alone, and not to one which is of right a part of his own proper domain. In this case, the territory over which the government of the United States had acquired, as we have supposed, some rights in the nature of rights of conquest, belonged of right to it as a part of its own domain, and it remains to be considered whether that fact makes any difference in respect to the right by the laws of war to govern a country conquered.

It may be said that the act of the United States in this case, had not the usual effect of a conquest of foreign territory—that instead of acquiring anew the rights of a conqueror, the United States, by this conquest (as I for the sake of convenience have called it), has but removed the obstacles to the enjoyment of its pre-existing rights, and has not acquired any new ones of a conqueror. As we have seen, the foundation of the right of a conqueror to govern conquered territory, and for that purpose to establish provisionally civil institutions in it, is necessity, and that chiefly the necessity of the conquered country and its inhabitants. A government of some kind they must have, for no community can exist without it.

The power of the conqueror has overridden and subjected all other power, and this necessity can be supplied from no other source than him, for he holds for the time being all power. Whilst this continues to be the case, what is there in the case in question of Louisiana, which should make it different from a foreign country?

The inhabitants of that country owed allegiance to, and were entitled to the protection of the government of the United States, it is said familiarly, and this is quite true in the sense in which the remark is usually made. But did the United States ever at any time, or under any circumstances, owe the people of this territory a protection and government which would supply all, or any considerable part of their wants in this respect?

If the government of the United States should afford to this country all the protection and aid—should perform for it all the governmental offices which it by virtue of the constitution and laws of the land was ever bound, or had a right to do, how far would this go towards supplying the wants of the country in that respect? Is it not quite certain, on looking into the law on the subject of the relations, rights and duties of the federal government to the tract of country in question, or any other tract embraced within the state, that with the federal government in full function and all its duties fully performed, a very small portion of the governmental necessities of the country would be supplied?

United States agt. Reiter.

It is a fact familiar to us all, that under our system of government almost all the governmental aid needed by our people is due to them from the local depositories of power, the state governments—for most purposes within their own territory. sovereign. These governments, under our system, are the repositories of nearly all of the powers of government in ordinary times in familiar use among us, and whether they be applied by the state itself, by its own officers directly, or be allotted out in parcels to smaller governmental districts, such as counties or parishes, cities, towns, or villages, to be applied by the officers of those localities respectively, still the state and not the federal government is the reservoir from which they are drawn, whether it be for distribution or exercise; and the state, and not the federal power and officers, administer and execute them.

The man of commerce, the seaman a traveler on the highway of nations, the soldier, whether at home or abroad, the direct instrument of the government, and at once its representative and defender, and the traveler in a foreign land experience and realize the power and the protecting hand of the federal government, its value and beneficence; but in the ordinary walks of life, at home, among plain people, very few—probably not one in a hundred—have occasion in a lifetime to invoke or experience any office or effect, enabling or restraining, protective or punitive, of that government, whose duty relates in ordinary times and circumstances almost exclusively to the foreign relations of the country, happily almost always so secure and free from threatening aspect or cause of anxiety as to attract little or no consideration.

From which government comes the system of police by which order in society is maintained from one end of the land to the other? From which the judicial power—the one in question *here and now*—by which, in ordinary cases, crime is punished and repressed, controversies decided, and the rights of persons and property established and maintained? and what is certainly quite in point, from *which source* comes the power by which these very unfortunate criminals now before me would ordinarily on a basis of peace be tried, and justice be meted out to them? What law of the United States, as laid down in the constitutions and statutes thereof, did Reiter violate, when (forsaken of his God) he took the life of his wife, the partner of his bosom, on that hopeful holy morning of the anniversary of the birth of our Saviour, in the year of that event one thousand eight hundred and sixty-two? What law of the United States did Louis—poor benighted Louis—whose eyes had scarcely been blessed with the sight of himself free to seek his own security or happiness—violate, when he applied the fatal torch to the fated house, the residence of a human being?

It is quite certain that the government of the United States, remitted to its ordinary constitutional functions within one of the states as in times of peace, could not supply a government at all adequate to the necessities of society, and especially could not have taken cognizance of, or punished at all either of the offences in question by any tribunal it ever had or had the right to establish.

The necessity for a provisional government here for nearly all the purposes

United States agt. Reiter.

for which a government is necessary, and especially of a provisional tribunal for dispensing justice generally, and in cases like these now under consideration, was the same as, and none other than it would have been if this tract of country in question had been a part of the domain of a government wholly foreign to that of the United States, and over the territory of which it had no other rights than those growing out of war and conquest.

Indeed, it may well be doubted whether, in reference to governmental rights and duties in matters of this kind, there is any difference between the citizens of the several states and those of foreign territory.

Certain it is from what has been said, that this territory is not, by the nature of our system of government, under the dominion of the federal government as to most matters of local administration, but is exclusively under the state and local government, and the federal government was never bound and never assumed or pretended to furnish government to any section of the states as to their internal or local matters generally, and has not, and never had the duty, right or power to do so.

But this district of territory had been in insurrection against the government of the United States, had openly withdrawn from all connection with that government under the forms of law and civil legislation, had allied itself with others hostile and at war with it, and had, by force of arms, for a considerable time maintained this attitude external and hostile, resisting successfully the efforts of the government to subject it to law and duty.

However the act of secession was ineffectual in law, this district had in fact and practically withdrawn from all relations with the government of the United States, and had arrayed itself in armed hostility to it. Its duties remain unchanged no doubt, but its rights to the filial relation—its rights to receive from the federal government the consideration and care of a parent rather than the imperious commands of a military master, may have been much changed by the events which had transpired, and I think that they had been. Having taken for itself the attitude of a foreign state, and that too of one hostile and at war with the United States, and formed and adapted all its civil institutions, and in every respect bent itself to that condition, and claimed and asserted it, and practically maintained it by force of arms for a time, and having been at this overcome and subjected to the arms of the government of the United States, it may very well be that while it has acquired no new rights by virtue of its pretensions, it has resigned and forfeited old ones, and is no longer entitled to demand the benefits of a relation it has renounced and repudiated, however it may have failed in establishing at that time its freedom from the duties attendant upon it.

The counsel for the prisoners Reiter and Louis, however, take different grounds on this notion. The former insists that the whole structure of the court in its origin was without warrant in law. That inasmuch as the constitution and laws of the United States give no authority to the president to establish such a court, he has none, and that his act in attempting to establish it is ineffectual, from want of constitutional and legal power in him. While the learned counsel for the accused Louis concedes that the

United States agt. Reiter.

president, as commander of the forces of the United States, had authority by the laws of war to establish it, and that it had originally all the powers by him attempted to be conferred, but insist that these powers have ceased, by reason, as I understand the argument, of the organization of a civil government here which supersedes the military. I pass to consider the question presented by this argument. If a conqueror in a conquered country have a right to set up a government in it, when does that right cease? Or, rather, if he have such a right, and exercise it, when does the power of the government so set up cease?

I answer, *first*, it will terminate necessarily whenever the power which formed it shall terminate, or become unable to support it. And *secondly*, whenever that power shall for any cause voluntarily bring it to an end. That the power of the federal government here has not been terminated, I need no argument to prove. It certainly has not been expelled, and it quite as certainly has not been withdrawn. It remains, we all feel and realize, the great, beneficent, paramount, and only power here; able ever to support and supporting itself, and furnishing and supporting every governmental office and function here.

But on this point, as well as the one to which I have cited the cases above referred to, some of those cases speak as authorities. In two of those cases, at least, in which the power of the provisional government and the provisional courts was sustained by the supreme court of the United States, it was so upheld in territory belonging, aside from military occupation and of right to the domain of the United States, and over which that government had powers of government, full and complete, for all purposes, as any sovereign or state has ordinarily within its own territory; rights not limited to its external matters alone, or chiefly, as are those of the United States in territory lying within one of the states, but embracing powers for all the details of local administration, legislative, executive and judicial. And even there, where the United States had by the constitution, powers of government ample for all purposes, the power to continue in force a provisional government long after military occupation had ceased, and when the rights of the United States there depended not at all on military power, or belligerency, but wholly on compact between the former sovereign and itself—even there, in territory confessedly belonging to the United States, and in time of peace, and in the absence of military power or military necessity, the provisional government and the provisional courts were upheld to the fullest extent, and were adjudged to continue legally and practically in force as instruments of the federal government until it should, by its constitutional action, through its legislature, otherwise provide.

In the earlier of those cases, *Cross agt. Harrison* (16 How. Rep. 164), the court say: "Our conclusion from what has been said is, that the civil government of California, organized as it was, from a right of conquest, did not cease or become defunct in consequence of the signature of the treaty or from its ratification. We think it was continued over a ceded conquest, without any violation of the constitution or laws of the United States, and that until congress legislated for it, the duties upon foreign goods, &c.,

United States agt. Reiter.

were legally demanded and lawfully received by Mr. Harrison, the collector of the port, who received his appointment, &c., &c., from Governor Mason."

These cases, in deciding that a provisional government may be maintained by the military power of the United States in territory belonging to it, not held in military occupation, or *jure belli*, go far to prove the fact that this country belonged, for some purposes to the United States, aside from the coming from conquest and military occupation, did not take it from the application of the general principle that the conqueror in conquered territory has the right to govern it and to establish government as he may deem expedient; but that such territory, on the contrary, is on the same footing in that respect as territory strictly and for all purposes foreign. There is no pretense that the federal government has in any manner directly brought, or sought to bring, the labors of this court to a close. Having established it, and bade it proceed in the performance of its mission, it will continue (the power which established it continuing) until that power shall revoke its commission, or otherwise decree its discontinuance. But it is said that a civil government has been established here, and that therefore the proper functions of the provisional one, and among others, the functions of the provisional court have ceased. It is quite true that some measures apparently tending to the establishment of a civil government have been taken. Members of congress were elected in 1862, and were admitted to seats in the national legislature. Several other officers—a governor, attorney-general, and others, have also been elected more recently under the direction of the military authorities. A convention for the revision of the constitution of the state has been elected and convened. These things look like measures for the organization of a state government, and measures of this kind pursued may in course of time lead to such a consummation, at the pleasure of the federal government. That all these things have been done under and by virtue of the fostering care of the federal government, as exercised by the military arm of it, no one at all acquainted with the facts will doubt. Waiving, for the present, however, as unnecessary to be considered here, the question whether these movements have their foundation in and derive their vital principle from the state or from federal sources—and whether in use, as some of them are, they are in fact instruments in the hands of the defunct state, or of the living federal power, it is quite certain and sufficient for present purposes that the federal government has not voluntarily abdicated and resigned to them all, or generally the functions of government, certainly not those of the provisional court. Such a general surrender alone could have divested the power of this court, for there is no pretense that the federal government has singled out certain powers, and among them the powers heretofore exercised by this court, and so parted with them as to be unable to recall or exercise them. The whole argument, on the contrary, proceeds on the idea that civil government, as a whole, has been established here, and all the power to exercise it resigned into the hands of state authorities. In short, that the state is again in possession of all the governmental powers which of right, under our system, belong to the state, in contradistinction to the federal government, and that

United States agt. Reiter.

the United States retain only what are designed under our system of government, ordinarily to be exercised by the federal government in all the states in times of peace, and that both parties are, in fact, remitted to their own positions in the constitutional government formerly occupied by them, and the same as are now occupied by the loyal states. At the time this motion was made (and everything must relate to that time) there was not a court in the part of Louisiana within the federal lines having any reasonable pretence of authority from any other source than the federal government. The United States district and circuit court then in operation here, were and are the constitutional courts of that government. All else were creations of the military power of the federal government.

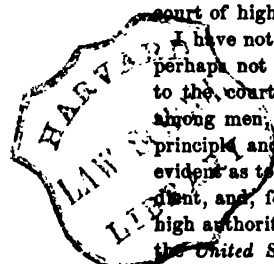
The learned argument of Mr. Lamont, the prosecuting attorney of this court, on that point was entirely correct. All the governmental functions in exercise here at that time, not only courts of justice but all others, and all the judges, officers and instruments by which they were performed and operated, were those of the federal government, and were appointed, commissioned, animated, sustained and moved by that power alone. The provisional court for the State of Louisiana—the court of the federal government—retains all the powers it ever had, and will continue to exercise rightfully a jurisdiction commensurate with its charter, so long as the president, or the government he represents, shall will it, and shall uphold it for that purpose; and whatever other institutions may have been brought or allowed to come into existence in the meantime, this court will not cease, or go out of existence, or be shorn of any of its powers or proportions by reason of the fact that some modicum of them, or of other powers of civil government have been allotted by the common parent—the federal government—to other institutions or instrumentalities.

Something was said on the argument about the laws which these courts should administer. The laws of the conquered country, like everything else connected with its government, are entirely under the control and subject to the will of the conqueror. He makes and adopts them in use at his pleasure. Those found in use at the time of the conquest may be continued in use by him or laid aside at his pleasure. If continued in use, however, they become his, and derive their force and efficacy from him and his adoption of them. In the cases cited above, a new code was made and introduced by General Kearney, representing the government of the conqueror, called the Kearney code. In the absence of any provision on the subject, in such a case courts of justice are not bound to adhere to any particular system. This court is commissioned to administer justice, and no code of laws is prescribed for it. It may adopt such rules as may seem wise and expedient, whether corresponding to the system in use here at the time of the conquest, or differing from it. It has always administered justice according to the code of Louisiana, and so have all other courts here, not because it was *bound* by that code, as the law of the state, but because it seemed expedient and wise to continue along under the system found in use here, rather than introduce a new one. That system had had the sanction of the previous state government, and was no doubt suited to

 United States agt. Reiter.

the occupations, habits and wants of the people. The transactions which would become subjects of investigation had been entered into under and in reference to it as the system by which they would be construed and enforced. Moreover, it was already in use, and had better be continued in use and a change avoided, unless for some decided cause a change was deemed necessary. Having adopted that as the rule in the courts here, it became law to them as well as to society here, and they were bound to adhere to it and administer justice according to it so long as it continued to be the rule. The courts here have always done that, and it is not probable that the laws of Louisiana have ever been more closely adhered to in the administration of justice here than they have been during the time of the government of the country by the federal authorities, since the occupation of it by their forces.

In the cases cited above from California, *Cross agt. Harrison* (16 *Howard R.* 164); *Leitensdorfer agt. Webb* (20 *Id.* 176), and *Jecker agt. Montgomery* (14 *Id.* 498), the previously existing systems of law were ignored and a new and original system introduced, which course received the sanction of the supreme court of the United States in those cases; and in the case cited from Maine, *The United States agt. Rice* (4 *Wheaton*, 254), the British government made a new and different law and administered it while the territory was held by it, and that course received the sanction of the same court of highest authority, in the case referred to.



I have not cited authority for everything I have said in this opinion—perhaps not for every doctrine I have declared; I have, however, referred to the court of highest authority in such cases of any tribunal known among men; and to the decisions of that court, quite in point, for every principle and doctrine claimed in this opinion, which is not so plain and evident as to make reference to cases for authority unnecessary and inexpedient, and, for the omission to cite them to such points, I have the very high authority of the supreme court of the United States, in the case of *the United States agt. Rice* (4 *Wheaton*, 254), above referred to, that in cases like that "too clear to require aid from authority," it is not well to encumber an opinion with them.

In addition to the cases already commented on, I will refer to several more having important bearing on this question, not as establishing any new principle or sustaining any old one not better sustained by more modern and unquestionable authority already referred to, though equally conclusive of the principle with them; but as furnishing, perchance, to some mind, some new view, reason, or illustration of a principle better established on authority by cases already introduced. (*Grotius De J. B. ac. P. l. 2 c. 5 et seq.*; *Ib. l. 3 c. 6, s. 4*; *Ib. l. 3 c. 9 s. 9, 14*; *Puffendorf, by Barbeyrac, l. 7, c. 7, s. 5*; *Ib. l. 8, c. 11, s. 8*; *Bynkershoek, Q. J., Pub., l. 1, c. 6, 16*; *Duponceau's transl., 46, 124*; *Voet ad Pandect, l. 39, tit. 4, no. 7, De Vectigalibus*; *Ib. l. 19, tit. 2, no. 28*; *Ib. l. 49. tit. 15, no. 1*; *United States agt. Hayward, 2 Gallis. 601*; *The Fama, Rob. 106*; *The Foltina, Dodson, 450*; *30 Hogsheads of Sugar, Bentzen, claimant, 9 Cranch, 191*; *Reeve's Law. of Ship. 98 et seq.*; *United States agt. Fowell, 5 Cranch, 368*; *United States agt. Arnold,*

United States agt. Reiter.

1 *Gallis*. 848, S. C., 9 *Cranch*, 106; *Empson* agt. *Bathurst*, *Winch. Rep.* 20, 50, *Winch. Entries*, 834, cited *Poph.* 176, S. C. *Hutton*, 52, *Com. Dig. Officer*, H.)

My conclusions, therefore, are : That at the time of the establishment of the provisional court for Louisiana, a considerable part of the territory of that state was held by the forces of the United States, in armed belligerent occupation. That in a country so held, the authority of the occupying force is paramount, and necessarily operates the exclusion of all other independent authority in it. That government from some source is a necessity, and while the power to give and administer government is exclusively with a party occupying a country, there can be no doubt that the right and the duty are his to furnish a government and supply that want. That the actual military occupation of that territory by the United States has continued from that time to the present, and still continues, and the right and duty of government, therefore, continue with the United States. That the establishment of the provisional court for Louisiana, by the president, as commander-in-chief of the forces of the United States, while they held the territory in which it was to exercise its functions, was an act warranted by the law of nations. That so long as the authority of the United States shall continue, the right and the duty of it as the party dominant there to afford to the country a government will continue. That said court has, from the time of its foundation to the present time, rightfully exercised its functions in territory in which the government of the United States has been by force of its arms sovereign, and will continue rightfully to exercise them there, so long as its mission shall remain unrevoked and the power of the United States shall continue to support it in the exercise of them.



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